United Nations

A/CN.4/690

General Assembly

Distr.: General
21 January 2016

Original: English

International Law Commission
Sixty-eighth session
Geneva, 2 May-10 June and 4 July-12 August 2016

Second report on crimes against humanity

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[*] The Special Rapporteur wishes to thank Hervé Ascensio, Olympia Bekou, Sarah Bessell, Arturo Carillo, Hans Corell, Anne Dienelt, Sarah Freuden, Beatrice Gatti, Rainier Huhle, Florian Jeßberger, Wolfgang Kaleck, Gregory Kehoe, Lauren Koester, Nora Mbagathi, Annalise Nelson, Robert Petit, Matevž Pezdirc, Hugo Relva, Christian Ritscher, Leila Sadat, Herb Somers, Jennifer Summerville, Julie Tenenbaum, Christine Van den Wyngaert, Zelda Vassar, Laura Withers, the International Nuremberg Principles Academy and the George Washington University Law School International Human Rights Clinic for their invaluable assistance in the preparation of the present report.

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Introduction

A. Work to date on this topic

1. At its sixty-sixth session in July 2014, the International Law Commission placed the topic "Crimes against humanity" on its current programme of work and appointed a Special Rapporteur.[1] At its sixty-seventh session in May 2015, the Commission held a general debate concerning the Special Rapporteur's first report and in July 2015 provisionally adopted four draft articles with commentary.[2]

B. Debate in 2015 in the Sixth Committee

2. During the debate in the Sixth Committee in 2015, 38 States[3] addressed this topic with reactions that generally favoured the Commission's work, stressing the importance of the topic,[4] welcoming the four draft articles[5] and viewing them as largely reflecting existing State practice and jurisprudence.[6] Among other things, States expressed appreciation that the topic was proceeding in a manner that was complementary to the system of the Rome Statute of the International Criminal Court[7] and underscored the need to avoid establishing new obligations that would conflict with obligations existing under the Statute or other treaties.[8] A large number of States agreed with the Commission's approach of using, in draft article 3, the definition of crimes against humanity that appears in article 7 of the Rome Statute

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[1] See the report of the Commission on the work of its sixty-sixth session, *Yearbook … 2014*, vol. II (Part Two), para. 266.

[2] See the report of the Commission on the work of its sixty-seventh session, *Yearbook … 2015*, vol. II (Part Two), para. 113.

[3] Presentations to the Sixth Committee were made by: Argentina; Austria; Belarus; Chile; China; Croatia; the Czech Republic; El Salvador; France; Germany; Greece; Hungary; India; Indonesia; the Islamic Republic of Iran; Israel; Italy; Japan; the Republic of Korea; Malaysia; Mexico; New Zealand; the Netherlands; Peru; Poland; Portugal; Romania; the Russian Federation; Singapore; Slovakia; Slovenia; South Africa; Spain; Sweden (on behalf of the Nordic countries); Switzerland; Turkey; the United Kingdom of Great Britain and Northern Ireland; and the United States of America.

[4] See, for example, China, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 22nd meeting* (A/C.6/70/SR.22), para. 63; Israel, *ibid., 21st meeting* (A/C.6/70/SR.21), para. 73; Japan, *ibid., 22nd meeting* (A/C.6/70/SR.22), para. 129; and Malaysia, *ibid., 23rd meeting* (A/C.6/70/SR.23), para. 46.

[5] See, for example, Slovakia, *ibid., 23rd meeting* (A/C.6/70/SR.23), para. 12; and South Africa, *ibid.*, para. 13.

[6] See, for example, Czech Republic, *ibid., 20th meeting* (A/C.6/70/SR.20), para. 59; Spain, *ibid., 22nd meeting* (A/C.6/70/SR.22), para. 94; Slovenia, *ibid., 23rd meeting* (A/C.6/70/SR.23), para. 4; and Switzerland, *ibid., 22nd meeting* (A/C.6/70/SR.22), paras. 18–19.

[7] See, for example, Italy, *ibid., 17th meeting* (A/C.6/70/SR.17), para. 59; and Mexico, *ibid., 21st meeting* (A/C.6/70/SR.21), para. 51.

[8] See, for example, Hungary, *ibid.*, para. 83; India, *ibid.*, para. 65; Italy, *ibid., 17th meeting* (A/C.6/70/SR.17), para. 58; Japan, *ibid., 22nd meeting* (A/C.6/70/SR.22), para. 130; Malaysia, *ibid., 23rd meeting* (A/C.6/70/SR.23), para. 47; Portugal, *ibid., 22nd meeting* (A/C.6/70/SR.22), para. 61; Sweden (on behalf of the Nordic countries), *ibid., 20th meeting* (A/C.6/70/SR.20), para. 62015; and the United Kingdom, *ibid., 23rd meeting* (A/C.6/70/SR.23), para. 36.

of the International Criminal Court,[9] while two States indicated a desire to improve upon that definition.[10]

3. Several States noted the value in focusing this project on issues such as the prevention of crimes against humanity,[11] the adoption and harmonization of national laws,[12] *aut dedere aut judicare*,[13] offences by not just States but also non-State actors[14] and the promotion of inter-State cooperation, including through extradition and mutual legal assistance.[15] At the same time, some States called for greater clarity in what is meant by an obligation to prevent,[16] called for different terminology (such as referring to crimes against humanity as "the most serious crimes of international concern" or as "international crimes" rather than as "crimes under international law"[17]), pressed for addressing certain issues (for example, the inapplicability of statutes of limitations,[18] immunity,[19] reparations for victims[20] or the need for national courts to take into account international jurisprudence[21]) or urged avoiding certain issues (such as civil jurisdiction,[22] immunity[23] or the creation of an institutional structure to monitor a new convention[24]).

4. Many States indicated that they supported the drafting of these articles for the purpose of a new convention.[25] Some States noted the existence of a different

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[9] Argentina, *ibid.*, *23rd meeting* (A/C.6/70/SR.23), para. 72; Austria, *ibid.*, *20th meeting* (A/C.6/70/SR.20), para. 32; the Czech Republic, *ibid.*, para. 59; France, *ibid.*, para. 20; Germany, *ibid.*, *22nd meeting* (A/C.6/70/SR.22), para. 15; Japan, *ibid.*, para. 130; the Republic of Korea, *ibid.*, *23rd meeting* (A/C.6/70/SR.23), para. 56; New Zealand, *ibid.*, *22nd meeting* (A/C.6/70/SR.22), para. 31; Poland, *ibid.*, *21st meeting* (A/C.6/70/SR.21), para. 68; Portugal, *ibid.*, *22nd meeting* (A/C.6/70/SR.22), para. 61; Romania, *ibid.*, *21st meeting* (A/C.6/70/SR.21), para. 79; the Russian Federation, *ibid.*, *23rd meeting* (A/C.6/70/SR.23), para. 18; Slovakia, *ibid.*, para. 12; Slovenia, *ibid.*, para. 4; South Africa, *ibid.*, para. 14; Sweden (on behalf of the Nordic countries), *ibid.*, *20th meeting* (A/C.6/70/SR.20), para. 6; Switzerland, *ibid.*, *22nd meeting* (A/C.6/70/SR.22), para. 18; and the United Kingdom, *ibid.*, *23rd meeting* (A/C.6/70/SR.23), para. 36.

[10] Croatia, *ibid.*, *22nd meeting* (A/C.6/70/SR.22), para. 78; and Mexico, *ibid.*, *21st meeting* (A/C.6/70/SR.21), paras. 52–54.

[11] New Zealand, *ibid.*, *22nd meeting* (A/C.6/70/SR.22), para. 31; Slovenia, *ibid.*, *23rd meeting* (A/C.6/70/SR.23), para. 5; and South Africa, *ibid.*, para. 13.

[12] Peru, *ibid.*, *21st meeting* (A/C.6/70/SR.21), para. 93; and the Russian Federation, *ibid.*, *23rd meeting* (A/C.6/70/SR.23), para. 18.

[13] Sweden (on behalf of the Nordic countries), *ibid.*, *20th meeting* (A/C.6/70/SR.20), para. 6; and the United Kingdom, *ibid.*, *23rd meeting* (A/C.6/70/SR.23), para. 36.

[14] Israel, *ibid.*, *21st meeting* (A/C.6/70/SR.21), para. 74.

[15] See, for example, Germany, *ibid.*, *22nd meeting* (A/C.6/70/SR.22), para. 14; Portugal, *ibid.*, para. 61; and Switzerland, *ibid.*, para. 20.

[16] Indonesia, *ibid.*, *23rd meeting* (A/C.6/70/SR.23), para. 29.

[17] Austria, *ibid.*, *20th meeting* (A/C.6/70/SR.20), para. 31; and France, *ibid.*, para. 20.

[18] Switzerland, *ibid.*, *22nd meeting* (A/C.6/70/SR.22), para. 20.

[19] Malaysia, *ibid.*, *23rd meeting* (A/C.6/70/SR.23), para. 48; and Switzerland, *ibid.*, *22nd meeting* (A/C.6/70/SR.22), para. 20.

[20] El Salvador, *ibid.*, para. 105; and Poland, *ibid.*, *21st meeting* (A/C.6/70/SR.21), para. 68.

[21] Germany, *ibid.*, *22nd meeting* (A/C.6/70/SR.22), para. 15.

[22] The United Kingdom, *ibid.*, *23rd meeting* (A/C.6/70/SR.23), para. 37.

[23] *Ibid.*

[24] France, *ibid.*, *20th meeting* (A/C.6/70/SR.20), para. 21.

[25] See Austria, *ibid.*, *20th meeting* (A/C.6/70/SR.20), para. 30 (welcoming the Special Rapporteur's conclusions regarding a future convention on the topic); Chile, *ibid.*, *22nd meeting* (A/C.6/70/SR.22), para. 86 (stating that the Commission's contribution to developing a new treaty in this area was vital); Croatia, *ibid.*, para. 75 (strongly supporting all efforts aimed at developing a global international instrument); El Salvador, *ibid.*, para. 103 (agreeing on the importance of elaborating a new draft convention devoted to such crimes, so as to fill existing

initiative to develop a new convention focused just on mutual legal assistance and extradition, and relating not just to crimes against humanity but to the most serious international crimes.[26] Three States expressed doubts as to the desirability and necessity of a new convention on crimes against humanity, viewing the Rome Statute of the International Criminal Court and other existing instruments as sufficient,[27] while two States suggested that outcomes other than a new treaty might be more appropriate.[28]

5. In addition to the debate in the Sixth Committee, this report has benefited from written comments received from States in response to the request made by the Commission in 2014[29] (reiterated in 2015[30]) for information on existing national laws and jurisprudence with respect to crimes against humanity.

C. Purpose and structure of the present report

6. The purpose of the present report is to address various actions to be taken by States under their national laws with respect to crimes against humanity, which are among the most serious crimes of concern to the international community as a whole. The issues addressed herein are: establishment of national laws that identify offences relating to crimes against humanity; establishment of national jurisdiction so as to address such offences when they occur; general investigation and cooperation for identifying alleged offenders; exercise of national jurisdiction when an alleged offender is present in a State's territory; submission of the alleged offender to prosecution or extradition or surrender (*aut dedere aut judicare*); and fair treatment of the alleged offender at all stages of the process.

7. Chapter I of this report addresses the obligation of a State to establish national laws that identify offences relating to crimes against humanity. An obligation of this

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gaps); Germany, *ibid.*, para. 14 (finding that a new convention would not only complement treaty law on the core crimes, but also foster inter-State cooperation); Hungary, *ibid., 21st meeting* (A/C.6/70/SR.21), para. 83 (indicating that there was no unified treaty basis for prosecuting crimes against humanity, such as exists for war crimes and genocide, and therefore a legal gap needs to be addressed); Indonesia, *ibid., 23rd meeting* (A/C.6/70/SR.23), para. 29 (asserting that a new convention was an essential part of the international community's effort to combat impunity and a key missing piece in the current framework); Israel, *ibid., 21st meeting* (A/C.6/70/SR.21), para. 74 (indicating that it would be honoured to contribute to the drafting of a new treaty); Italy, *ibid., 17th meeting* (A/C.6/70/SR.17), para. 58 (convinced of the potential benefits of developing a convention on the subject); Peru, *ibid., 21st meeting* (A/C.6/70/SR.21), para. 93 (welcoming work towards development of a possible future convention); Portugal, *ibid., 22nd meeting* (A/C.6/70/SR.22), para. 61 (finding that a new convention could help fight impunity and ensure accountability); Slovakia, *ibid., 23rd meeting* (A/C.6/70/SR.23), para. 12 (finding wise the decision to approach the topic by drafting a new convention, since that was the only viable option); Switzerland, *ibid., 22nd meeting* (A/C.6/70/SR.22), paras. 18 and 20 (favouring a concise convention); and the United States, *ibid.*, para. 41 (finding that developing draft articles for a convention could prove valuable).

[26] Argentina, *ibid., 23rd meeting* (A/C.6/70/SR.23), para. 71; Greece, *ibid., 20th meeting* (A/C.6/70/SR.20), para. 48; the Netherlands, *ibid., 21st meeting* (A/C.6/70/SR.21), paras. 41–43; and Slovenia, *ibid., 23rd meeting* (A/C.6/70/SR.23), para. 6.

[27] Belarus, *ibid., 21st meeting* (A/C.6/70/SR.21), para. 30; Greece, *ibid., 20th meeting* (A/C.6/70/SR.20), paras. 47–48; and the Islamic Republic of Iran, *ibid., 23rd meeting* (A/C.6/70/SR.23), para. 67.

[28] Malaysia, *ibid.*, para. 48 (suggesting draft guidelines); and Singapore, *ibid., 21st meeting* (A/C.6/70/SR.21), para. 59 (suggesting unspecified other outcomes).

[29] *Yearbook ... 2014*, vol. II (Part Two), para. 34.

[30] *Yearbook ... 2015*, vol. II (Part Two), para. 24.

kind typically exists in treaties addressing crimes and, in doing so, provides that the State's national criminal law shall establish criminal responsibility when the offender "commits" the act (sometimes referred to in national law as "direct" commission, "perpetration" of the act or being a "principal" in the commission of the act), attempts to commit the act, or participates in the act or attempt in some other way (sometimes referred to in national law by terms such "soliciting", "aiding" or "inciting" the act, or as the person being an "accessory" or "accomplice" to the act). Further, relevant international instruments, as well as many national laws, provide that commanders and other superiors are criminally responsible for the acts of subordinates in certain circumstances. Such instruments and laws also provide that the fact that an offence was committed by a subordinate pursuant to an order of a superior is not, by itself, a ground for excluding criminal responsibility of the subordinate, and sometimes provide that no statute of limitations shall be applied for such offences. Finally, such instruments and laws typically provide that penalties shall sufficiently take into account the grave nature of the offence. Chapter I concludes by proposing a draft article addressing these points for crimes against humanity.

8. Chapter II of this report addresses issues relating to the establishment of national jurisdiction so as to address such offences when they occur. To ensure that there is no safe haven for those who commit such crimes against humanity, this chapter identifies the various types of State jurisdiction that treaties addressing crimes typically require States parties to establish. Such jurisdiction normally must be established not just by the State where the offence is committed, but by other States as well, based on connections such as the nationality or presence of the alleged offender. These treaties also typically provide that, while they obligate a State to establish specific forms of jurisdiction, they do not exclude the establishment of other criminal jurisdiction by the State. Chapter II concludes by proposing a draft article addressing these points for crimes against humanity.

9. Chapter III of this report addresses the obligation of a State to investigate promptly and impartially whenever there is a reason to believe that a crime against humanity has occurred or is occurring in any territory under its jurisdiction or control. Some treaties addressing crimes have included an obligation to investigate whenever there are reasons to believe that the relevant crime has been committed in the State's territory, though many treaties have not done so. Ideally, a State that determines that such a crime has occurred or is occurring would notify other States if it is believed that their nationals are involved in the crime, thereby allowing those other States to investigate the matter also. In any event, if it is determined that a crime against humanity has occurred or is occurring, all States should cooperate, as appropriate, in an effort to identify and locate persons who have committed the offences relating to that crime. Given the importance of investigating and cooperating so as to identify alleged offenders, chapter III concludes by proposing a draft article addressing such an obligation.

10. Chapter IV of this report discusses the exercise of national jurisdiction over an alleged offender whenever he or she is present in a State's territory. Such an obligation typically exists in treaties addressing crimes and, in doing so, often addresses three requirements: that the State conduct a preliminary investigation; that the State, if necessary, take steps to ensure the availability of the alleged offender for criminal proceedings, extradition or surrender, which may require taking the individual into custody; and that the State notify other States having jurisdiction over the matter of the actions that the State has taken and whether it intends to

submit the matter to its competent authorities for prosecution. Chapter IV concludes by proposing a draft article addressing these points for crimes against humanity.

11. Chapter V of this report addresses the obligation to submit the alleged offender to prosecution or to extradite or surrender him or her to another State or competent international tribunal. Treaties addressing crimes typically contain such an *aut dedere aut judicare* obligation. Moreover, recent treaties have also acknowledged the possibility for the State to satisfy such an obligation by surrendering the alleged offender to an international criminal court or tribunal for the purpose of prosecution. Chapter V concludes by proposing a draft article addressing these points for crimes against humanity.

12. Chapter VI of this report discusses the obligation to accord "fair treatment" to an alleged offender at all stages of the proceedings against him or her, an obligation typically recognized in treaties addressing crimes. Such an obligation includes according a fair trial to the alleged offender. Furthermore, States, as always, are obligated more generally to protect the person's human rights, including during any period of detention. In the event that the alleged offender's nationality is not that of the State, the State is also obligated to permit the person to communicate and receive visits from a representative of his or her State. Chapter VI concludes by proposing a draft article addressing these points for crimes against humanity.

13. Chapter VII addresses a possible future programme of work. Annex I to this report contains the four draft articles provisionally adopted by the Commission at its sixty-seventh session, in 2015. Annex II contains the draft articles proposed in this report.

CHAPTER I

Criminalization under national law

14. The International Military Tribunal (IMT) at Nürnberg recognized the importance of punishing individuals for, *inter alia*, crimes against humanity when it stated that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[31] Pursuant to this judgment, the Commission's Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal provided that "[a]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment".[32] Similarly, the 1968 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity asserted in its preamble that "the effective punishment of ... crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion of international peace and security".[33]

15. Prosecution and punishment of persons for crimes against humanity may be possible before international criminal courts and tribunals, but must also operate at the national level to be fully effective. The preamble of the Rome Statute of the International Criminal Court affirms "that the most serious crimes of concern to the

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[31] "Judicial decisions: International Military Tribunal (Nuremberg) ...", p. 221.

[32] Principle I, *Yearbook ... 1950*, vol. II, p. 374.

[33] As of 2015, this Convention has 55 parties.

international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation". Indeed, given the limited capacity and, in some instances, limited jurisdiction of international courts and tribunals, some writers argue that, "[i]n most cases, the only way to enforce international criminal law is through the use of national courts".[34] Furthermore, some writers assert that "[n]ational prosecutions are not only the primary vehicle for the enforcement of international crimes, they are also often considered a preferable option — in political, sociological, practical and legitimacy terms — to international prosecutions".[35]

16. This chapter discusses the establishment of criminal responsibility under national law for persons who have committed crimes against humanity. It first discusses the current situation with respect to the adoption of national laws on crimes against humanity, demonstrating that many States have not done so. Next, it discusses various treaties that have obligated States to adopt national laws with respect to other crimes, which can help provide guidance for a draft article relating to crimes against humanity. This chapter then analyses different types (or modes) of liability that typically exist in national laws addressing crimes against humanity and in treaties addressing crimes, notably offences for committing the crime, attempting to commit the crime, and participating in committing or attempting to commit the crime. This chapter then considers offences that can arise due to command or other superior responsibility. An inability to avoid the offence on grounds of superior orders is considered, as well as the application of a statute of limitations to the crime. Consideration is then given to a requirement that appropriate penalties be issued. This chapter concludes with a proposed draft article consisting of three paragraphs, entitled "Criminalization under national law".

A. Crimes against humanity in national law

17. In their national laws, many States address, in some fashion, crimes against humanity and provide for national prosecution to address those crimes.[36] The Rome Statute of the International Criminal Court, in particular, has led to a number of national laws providing for crimes against humanity in terms identical to or very similar to the offence as defined in article 7 of that Statute. Indeed, of those States who responded as of 2015 to the Commission's request for information about their national laws, Austria,[37] Belgium,[38] the Czech Republic,[39] Finland,[40] France,[41] Germany,[42] the Republic of Korea,[43] the Netherlands,[44] Switzerland[45] and the United

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[34] Brown, p. 16.

[35] Cryer, p. 70. See also *ibid.*, p. 587 ("The site of most international criminal law enforcement is intended to be national systems, not international courts"); and Saul, p. 59.

[36] See *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/680, paras. 53–56. See also Eser *et al.*; Bergsmo, Harlem and Hayashi; García Falconí, p. 453; and van der Wolf. For country-specific studies, see, for example, Ferstman, p. 857; and van den Herik, p. 303.

[37] Written comments to the International Law Commission (2015), Austria ("a draft bill for the incorporation of specific international crimes under the Rome Statute of the International Criminal Court into the Austrian Criminal Code").

[38] *Ibid.*, Belgium, citing article 136*ter* of its Criminal Code ("Conformément au Statut de la Cour pénale internationale, le crime contre l'humanité").

[39] *Ibid.*, the Czech Republic.

[40] *Ibid.*, Finland.

[41] *Ibid.*, France.

[42] *Ibid.*, Germany.

[43] *Ibid.*, the Republic of Korea.

[44] *Ibid.*, the Netherlands.

Kingdom[46] all indicated that their national laws on crimes against humanity essentially align with the definition in the Statute. Cuba[47] and Spain[48] also criminalize crimes against humanity, although not in a manner identical to that of the Statute.

18. At the same time, many States have not adopted national laws on crimes against humanity. As indicated in the first report on this topic,[49] a study conducted in 2013 concluded that, based on a review of earlier studies, at best 54 per cent of the Member States of the United Nations (104 of 193) had some form of national law expressly on crimes against humanity.[50] The remaining Member States (89 of 193) apparently had no national law relating to crimes against humanity. Furthermore, the 2013 study found that earlier studies indicated that, at best, 66 per cent of parties to the Rome Statute of the International Criminal Court (80 of 121) had some form of national law relating to crimes against humanity, leaving 34 per cent of parties to the Statute (41 of 121) without any such law.[51] Consequently, it does not appear that States regard themselves as bound under customary international law to adopt a national law expressly criminalizing crimes against humanity.

19. States that have not adopted a national law on crimes against humanity typically do have national criminal laws that allow for punishment in some fashion of many of the individual acts that, under certain circumstances, may constitute crimes against humanity, such as murder, torture or rape.[52] These States, however, have not criminalized crimes against humanity *as such* and this failure may preclude prosecution and punishment of the conduct in terms commensurate with the gravity of the offence. In the context of the crime of torture under international law, the Committee against Torture[53] has expressed concern at the failure to adopt a national

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[45] *Ibid.*, Switzerland.

[46] *Ibid.*, the United Kingdom ("The definition [of crimes against humanity] is based on the definition in the ICC Statute").

[47] *Ibid.*, Cuba.

[48] *Ibid.*, Spain.

[49] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/680, paras. 58–61.

[50] International Human Rights Clinic, p. 8; see also The Law Library of Congress.

[51] International Human Rights Clinic, p. 8.

[52] Written comments to the International Law Commission (2015), the United States of America). See also *Situation in the Republic of Côte d'Ivoire in the case of the Prosecutor v. Simone Gbagbo, Case No. ICC-02/11-01/12 OA, Judgment of 27 May 2015 on the Appeal of Côte d'Ivoire against the Decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's Challenge to the Admissibility of the Case against Simone Gbagbo"*, International Criminal Court, Appeals Chamber, para. 99 (finding that a national prosecution for the ordinary domestic crimes of disturbing the peace, organizing armed gangs and undermining state security was not based on substantially the same conduct at issue for alleged crimes against humanity of murder, rape, other inhumane acts and persecution).

[53] See, for example, Conclusions and recommendations of the Committee against Torture, Slovenia (CAT/C/CR/30/4), paragraphs 5(*a*) and 6(*a*) (expressing concern that the "[s]ubstantive criminal law does not contain a specific crime of torture, which, although referred to in the Criminal Code, remains undefined" and recommending that the State party "[p]roceed promptly with plans to adopt a definition of torture which covers all the elements of that contained in article 1 of the Convention and amend its domestic penal law accordingly"); and Conclusions and recommendations of the Committee against Torture, Belgium (CAT/C/CR/30/6), paragraph 6 (recommending "that the Belgian authorities should ensure that all elements of the definition contained in article 1 of the Convention are included in the general definition provided by Belgian criminal law"). See also *ibid.*, Guatemala (CAT/C/GTM/CO/4 and Add.1), para. 10; *ibid.*, Saudi Arabia (CAT/C/CR/28/5), paragraphs 4(*a*) and 8(*a*); *ibid.*, France (CAT/C/FRA/CO/3 and Add.1), paragraph 5; and *ibid.*, Bosnia and Herzegovina

law that criminalizes torture in accordance with the definition of torture contained in the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. In its General Comment No. 2, the Committee asserted:

> Serious discrepancies between the Convention's definition and that incorporated into domestic law create actual or potential loopholes for impunity. In some cases, although similar language may be used, its meaning may be qualified by domestic law or by judicial interpretation and thus the Committee calls upon each State party to ensure that all parts of its Government adhere to the definition set forth in the Convention for the purpose of defining the obligations of the State. At the same time, the Committee recognizes that broader domestic definitions also advance the object and purpose of this Convention so long as they contain and are applied in accordance with the standards of the Convention, at a minimum.[54]

Even though a verbatim national adoption of the definition contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is not required, some writers maintain that it must at least adequately cover the Convention definition and must be adopted into national legislation and in particular in the penal code.[55]

B. Existing treaties obligating States to criminalize conduct in national law

20. Many States have ratified or acceded to treaties in the areas of international humanitarian law, human rights or international criminal law, which require criminalization of specific types of conduct.[56] For example, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide provides that "the Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III" of the Convention (art. V). States parties to the Convention have implemented this obligation through the adoption of national laws, such as the Netherlands Act of 2 July 1964 Implementing the Convention on Genocide[57] or the Act to Give Effect to the Convention on the Prevention and Punishment of the Crime of Genocide by Tonga.[58] Other States with laws implementing the Convention include Albania,[59]

(CAT/C/BIH/CO/1 and Add.1–2), paragraph 9. For comments by Governments on this issue see, for example, the report of the Committee against Torture, *Official Records of the General Assembly, Fifty-Seventh Session, Supplement No. 44* (A/57/44), paras. 30–35 (Benin), and ibid., *Fifty-Fifth Session, Supplement No. 44* (A/55/44), para. 49(a) (Austria), para. 54(a) (Finland), para. 68(a) (Azerbaijan), para. 74(a) (Kyrgyzstan), para. 80(a) (Uzbekistan), para. 87 (Poland), para. 150(b) (Paraguay), para. 160 (El Salvador) and para. 179(a) (United States of America).

[54] Committee against Torture, General Comment No. 2 (CAT/C/GC/2/CRP.1/Rev.4), para. 9. For an assessment of the Committee's practice with respect to article 2, see Nowak and McArthur, pp. 94–107.

[55] Nowak and McArthur, p. 239 (citing CAT/C/CR/30/6 (see footnote 53 above), para. 6; and Conclusions and recommendations of the Committee against Torture, Estonia (CAT/C/CR/29/5), para. 6(*a*)). See also Ingelse, p. 222.

[56] See, generally, Ambos, *Treatise on International Criminal Law*, pp. 93–95; and Dupuy and Kerbrat, pp. 587–588.

[57] Genocide Convention Implementation Act of 2 July 1964, available from wetten.overheid.nl/BWBR0002453/geldigheidsdatum_wijkt_af_van_zoekvraag/geldigheidsdatum_01-05-2002.

[58] Laws of Tonga, chapter 19, Act 8 of 1969, an Act to Give Effect to the Convention on the Prevention and Punishment of the Crime of Genocide, available from www.paclii.org/to/legis/consol_act/ga75.rtf.

[59] Criminal Code of the Republic of Albania, Law No. 7895 of 27 January 1995 (revised 2013), art. 73, available from www.legislationline.org/documents/section/criminal-codes.

Armenia,[60] Austria,[61] Brazil,[62] Bulgaria,[63] Croatia,[64] Cuba,[65] the Czech Republic,[66] Fiji,[67] Germany,[68] Ghana,[69] Hungary,[70] Israel,[71] Italy,[72] Liechtenstein,[73] Mexico,[74] Portugal,[75] Romania,[76] the Russian Federation,[77] Slovenia,[78] Spain,[79] Sweden[80] and the United States.[81] Instead of adopting a detailed national law on the crime of genocide, some States simply incorporate the Convention on the Prevention and Punishment of the Crime of Genocide in their national law by cross-reference.[82]

21. Similarly, each of the 1949 Geneva Conventions for the protection of war victims provides that "[t]he High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for the persons committing ... any of the grave breaches of the present Convention" as defined in

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[60] Criminal Code of the Republic of Armenia of 18 April 2003 (revised 2013), art. 393, *ibid.*

[61] Written comments to the International Law Commission (2015), Austria.

[62] Brazil, Act No. 2889 of 1 October 1956, available from www.preventgenocide.org/pt/direito/codigos/brasil.htm.

[63] Bulgaria, Criminal Code, No. 26/02.04.1968 (amended 2010), art. 416, available from www.legislationline.org/documents/section/criminal-codes.

[64] Croatia, Criminal Code, *Official Gazette* No. 110 of 21 October 1997 (revised 2003), art. 156, *ibid.*

[65] Cuba, Criminal Code, Law No. 62/87 of 29 December 1987, art. 116, para. 1, available from www.wipo.int/wipolex/en/text.jsp?file_id=242550.

[66] The Czech Republic, Criminal Code, Act No. 140/1961, provision 259, available from www.coe.int/t/dlapil/codexter/Source/country_profiles/legislation/CT%20Legislation%20-%20Czech%20Republic%20Criminal%20Code.pdf.

[67] Fiji Islands, Criminal Code, art. 69 (inserted by ordinance No. 25 of 1969, amended by Order 13 November 1970 and Ordinance No. 15 of 1973), available from www.preventgenocide.org/law/domestic/fiji.htm.

[68] Germany, Act to Introduce the Code of Crimes Against International Law of 26 June 2002, part 2, ch. 1, sect. 6, available from www.iuscomp.org/gla/statutes/VoeStGB.pdf.

[69] Ghana, Criminal Code of 1960, Act 29 (as amended up to 2003), sect. 49A, available from www.wipo.int/wipolex/en/details.jsp?id=1787.

[70] Hungary, Criminal Code, Act C of 2012 (promulgated on 13 July 2012), sect. 142, available from www.legislationline.org/documents/section/criminal-codes.

[71] Israel, Crime of Genocide (Prevention and Punishment) Law No. 5710-1950 of 29 March 1950, available from preventgenocide.org/il/law1950.htm.

[72] Italy, Law No. 962 of 9 October 1967, available from preventgenocide.org/it/legge.htm.

[73] Liechtenstein, Criminal Code of 24 June 1987, sect. 321, available from www.wipo.int/wipolex/en/details.jsp?id=10181.

[74] Mexico, Federal Criminal Code of 14 August 1931, art. 149 *bis* (updated 14 July 2014), available from www.wipo.int/wipolex/en/details.jsp?id=14542.

[75] Portugal, Criminal Code, Decree-Law No. 48/95 of 15 March 1995, art. 239, available from www.preventgenocide.org/pt/direito/codigos/portugal.htm.

[76] Romania, Criminal Code, Law No. 286 of 17 July 2009 (amended 2012), art. 438, available from www.legislationline.org/documents/section/criminal-codes.

[77] The Russian Federation, Criminal Code, No. 63-Fz of 13 June 1996 (amended 2012), art. 357, *ibid.*

[78] Slovenia, Criminal Code (KZ-1), art. 100 (2008), *ibid.*

[79] Spain, Criminal Code, Organic Act No. 10/1995, art. 607 (23 November 1995), *ibid.*

[80] Sweden, Criminal Code, Act No. 1964:169, available from preventgenocide.org/se/lag169.htm.

[81] United States Code, Title 18, sect. 1091 (2012), available from www.gpo.gov/fdsys/granule/USCODE-2011-title18/USCODE-2011-title18-partI-chap50A-sec1091.

[82] See, for example, Laws of Antigua and Barbuda, chapter 191, Genocide Act, section 3, available from www.laws.gov.ag/acts/chapters/cap-191.pdf; Laws of Barbados, Genocide Act, chap. 133A (1980-18), sect. 4, available from 208.109.177.6/en/ShowPdf/133A.pdf; Ireland, Genocide Act No. 28/1973, sect. 2(1), available from www.preventgenocide.org/law/domestic/ireland.htm; and Seychelles, Genocide Act 1969 (Overseas Territories), 1970, sect. 1(1), available from www.seylii.org/sc/legislation/consolidated-act/88.

those Conventions.[83] According to a comprehensive analysis of national laws conducted by the International Committee of the Red Cross, 98 States have adopted national laws to implement this provision of the Geneva Conventions for the protection of war victims, while at least 30 States address the matter in their military manuals.[84]

22. Indeed, obligations to "criminalize" certain acts in national law exist in a range of international conventions, including the 1970 Convention on the suppression of unlawful seizure of aircraft;[85] the 1973 Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents;[86] the 1979 International Convention against the taking of hostages;[87] the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[88] the 1985 Inter-American Convention to Prevent and Punish Torture;[89] the 1994 Convention on the Safety of United Nations and Associated Personnel;[90] the 1994 Inter-American Convention on Forced Disappearance of Persons;[91] the 1997 International Convention for the Suppression of Terrorist Bombings;[92] the 1999 International Convention for the Suppression of the Financing of Terrorism;[93] the OAU [Organization of African Unity] Convention on the Prevention and Combating of Terrorism, 1999;[94] the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,

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[83] Geneva Convention relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I), art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II), art. 50; Geneva Convention relative to the Treatment of Prisoners of War (Geneva Convention III), art. 129; and Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), art. 146.

[84] See the International Committee of the Red Cross (ICRC), Customary IHL Database, "Chapter 43: Practice relating to Rule 151. Individual responsibility" (see sections on national laws and on military manuals), available from www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter43_rule151.

[85] Art. 2 ("Each Contracting State undertakes to make the offence punishable by severe penalties").

[86] Art. 2, para. 2 ("Each State party shall make these crimes punishable by appropriate penalties which take into account their grave nature").

[87] Art. 2 ("Each State party shall make the offences set forth in [this Convention] punishable by appropriate penalties which take into account the grave nature of those offences").

[88] Art. 4 ("Each State party shall ensure that all acts of torture are offences under its criminal law. … Each State party shall make these offences punishable by appropriate penalties which take into account their grave nature").

[89] Art. 6 ("The States Parties shall ensure that all acts of torture and attempts to commit torture are offences under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature").

[90] Art. 9, para. 2 ("Each State party shall make the crimes set out in [this Convention] punishable by appropriate penalties which shall take into account their grave nature").

[91] Art. III ("The States Parties undertake to adopt … the legislative measures that may be needed to define the forced disappearance of persons as an offence and to impose an appropriate punishment commensurate with its extreme gravity").

[92] Art. 4 ("Each State party shall adopt such measures as may be necessary: (a) To establish as criminal offences under its domestic law the offences set forth in … this Convention; (b) To make those offences punishable by appropriate penalties which take into account the grave nature of those offences").

[93] Art. 4 ("Each State party shall adopt such measures as may be necessary: (*a*) To establish as criminal offences under its domestic law the offences set forth in [this Convention]; (*b*) To make those offences punishable by appropriate penalties which take into account the grave nature of the offences").

[94] Art. 2(*a*) ("States Parties undertake to … review their national laws and establish criminal offences for terrorist acts as defined in this Convention and make such acts punishable by appropriate penalties that take into account the grave nature of such offences").

supplementing the United Nations Convention against Transnational Organized Crime;[95] the 2006 International Convention for the Protection of All Persons from Enforced Disappearance;[96] and the 2007 ASEAN [Association of Southeast Asian Nations] Convention on Counter Terrorism.[97]

23. Reflecting on the acceptance of such obligations in treaties, and in particular within the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Court of Justice (ICJ), in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, stated:

> The obligation for the State to criminalize torture and to establish its jurisdiction over it finds its equivalent in the provisions of many international conventions for the combating of international crimes. This obligation, which has to be implemented by the State concerned as soon as it is bound by the Convention, has in particular a preventive and deterrent character, since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties ensure that their legal systems will operate to that effect and commit themselves to coordinating their efforts to eliminate any risk of impunity. This preventive character is all the more pronounced as the number of States parties increases.[98]

C. Commission of, attempt to commit, or participation in the crime

24. In the context of crimes against humanity, a survey of both international instruments and national laws suggests that various types (or modes) of individual criminal responsibility are addressed. First, all jurisdictions that have criminalized crimes against humanity impose criminal responsibility upon a person who "commits" the offence (sometimes referred to in national law as "direct" commission, as "perpetration" of the act or as being a "principal" in the commission of the act). For example, the Agreement for the prosecution and punishment of the major war criminals of the European Axis, Charter of the International Military Tribunal ("Nürnberg Charter") provided jurisdiction for the IMT over "persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes" (art. 6). Likewise, the Statutes of both the International Tribunal for the Former Yugoslavia[99] and the International Tribunal for Rwanda[100] provide that a person who "committed" crimes against humanity "shall be individually responsible for the crime". The Rome Statute of the International Criminal Court provides that "[a] person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment" and that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the

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[95] Art. 5 para. 1 ("Each State party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in … this Protocol").

[96] Art. 7, para. 1 ("Each State party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness").

[97] Art. IX, para. 1 ("The Parties shall adopt such measures as may be necessary, including, where appropriate, national legislation, to ensure that offences covered in Article II of this Convention, especially when it is intended to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature").

[98] *Judgment, I.C.J. Reports 2012*, p. 442, at p. 451, para. 75.

[99] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by Security Council resolution 827 (1993) of 25 May 1993, art. 7, para. 1.

[100] Statute of the International Tribunal for Rwanda, adopted by the Security Council in its resolution 955 (1994) of 8 November 1994, annex, art. 6, para. 1.

Court if that person … [c]ommits such a crime, whether as an individual [or] jointly with another" (art. 25, paras. 2 and 3(a)). Similarly, the instruments regulating the Special Court for Sierra Leone,[101] the Special Panels for Serious Crimes in East Timor,[102] the Extraordinary Chambers in the Courts of Cambodia,[103] the Iraqi Supreme Criminal Tribunal[104] and the Extraordinary African Chambers within the Senegalese Judicial System[105] all provide for the criminal responsibility of a person who "commits" crimes against humanity.

25. National laws that address crimes against humanity invariably criminalize the "commission" of such crimes. Virtually all of the States that responded to the Commission's request for information about their national legislation (Australia,[106] Austria,[107] Belgium,[108] Cuba,[109] the Czech Republic,[110] Finland,[111] France,[112] Germany,[113] the Netherlands,[114] Spain,[115] Switzerland,[116] the Republic of Korea[117] and the United Kingdom[118]) indicated that they criminalize "commission" of crimes against humanity.[119]

26. Although crimes against humanity are undertaken pursuant to a State or organizational policy, suggesting complicity at potentially the highest levels, persons at lower levels committing the offence are nevertheless criminally responsible. According to some writers, criminal responsibility for participation in the offence by

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[101] Statute of the Special Court for Sierra Leone, available from www.rscsl.org/documents.html, art. 6, para. 1.

[102] United Nations Transitional Administration in East Timor, Regulation 2000/15 on the establishment of Panels with exclusive jurisdiction over serious criminal offences (UNTAET/REG/2000/15), sect. 5.

[103] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, art. 5. See also the Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea (General Assembly resolution 57/228B of 22 May 2003).

[104] Statute of the Iraqi Special Tribunal, ILM, vol. 43, p. 236, art. 10(b). The Iraqi interim administration enacted a new statute in 2005, built upon the earlier statute, which changed the tribunal's name to "Iraqi Supreme Criminal Tribunal". See Law of the Supreme Iraqi Criminal Tribunal, Resolution No. 10, *Official Gazette of the Republic of Iraq*, vol. 47, No. 4006 (18 October 2005).

[105] Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990, ILM, vol. 52, No. 4 (2013), pp. 1028–1029, arts. 4(b) and 6.

[106] Written comments to the International Law Commission (2016), Australia, citing division 268 of its Criminal Code.

[107] Written comments to the International Law Commission (2015), Austria, citing section 321 of its Criminal Code.

[108] *Ibid.*, Belgium, citing article 136*sexies* of its Criminal Code.

[109] *Ibid.*, Cuba, citing article 18 of its Criminal Code.

[110] *Ibid.*, Czech Republic, citing section 401 of its Criminal Code.

[111] *Ibid.*, Finland, citing chapter 11, section 3 of its Criminal Code.

[112] *Ibid.*, France, citing article 212-1 of its Criminal Code.

[113] *Ibid.*, Germany, citing section 7 of its Criminal Code.

[114] *Ibid.*, the Netherlands, citing article 4 of its Criminal Code.

[115] *Ibid.*, Spain, citing article 451 of its Criminal Code.

[116] *Ibid.*, Switzerland, citing article 264a of its Criminal Code.

[117] *Ibid.*, the Republic of Korea, citing article 9 of its Criminal Code.

[118] *Ibid.*, the United Kingdom, referencing the International Criminal Court Act 2001.

[119] Treaties addressing other types of crimes also invariably call upon States parties to adopt national laws proscribing direct commission of the offence. Thus, the Convention on the Prevention and Punishment of the Crime of Genocide provides for individual criminal responsibility for the commission of genocide (art. III(*a*)).

such persons is necessary because large-scale international crimes "require not just planners and perpetrators, but numerous actors who participate — sometimes simply by doing their 'job' or because they want to get along or are unwilling to object to those more powerful — and who together make it possible for the crime to occur on a massive level".[120] Further, "commission" of the offence also "may involve an omission to perform prescribed conduct (that is, the failure to do obligatory acts)".[121]

27. Second, all such jurisdictions, to one degree or another, also impose criminal responsibility upon a person who participates in the offence in some way other than "commission" of the offence. Such conduct may take the form of an "attempt" to commit the offence, or acting as an "accessory" or "accomplice" to the offence or an attempted offence. With respect to an "attempt" to commit the crime, the Statutes of the International Tribunal for the Former Yugoslavia,[122] the International Tribunal for Rwanda and the Special Court for Sierra Leone contain no provision for this type of responsibility. In contrast, the Rome Statute of the International Criminal Court provides for the criminal responsibility of a person who attempts to commit the crime, unless he or she abandons the effort or otherwise prevents completion of the crime (art. 25, para. 3(f)). In the *Banda and Jerbo* case, the Pre-Trial Chamber asserted that criminal responsibility for attempt "requires that, in the ordinary course of events, the perpetrator's conduct [would] have resulted in the crime being completed, had the circumstances outside the perpetrator's control not intervened".[123] With respect to "accessorial" responsibility, such a concept is addressed in international instruments through various terms, such as "ordering", "soliciting", "inducing", "instigating", "inciting", "aiding and abetting", "conspiracy to commit", "being an accomplice to", "participating in" or "joint criminal enterprise".[124]

28. Thus, the Nürnberg Charter provides that "[l]eaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan" (art. 6). In its Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, the Commission noted in principle VII that "complicity" in the commission of a crime against humanity "is a crime under international law".[125]

29. Similarly, the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity provided in its article II that

> If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission.

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[120] Cassese *et al.*, p. 381. See also Bantekas, *International Criminal Law*, pp. 51–75.

[121] O'Keefe, p. 169.

[122] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (see footnote 99 above).

[123] *Prosecutor* v. *Banda and Jerbo, Case No. ICC-02/05-03/09, corrigendum of the Decision on the Confirmation of Charges of 7 March 2011*, International Criminal Court, Pre-Trial Chamber I, para. 96.

[124] See, generally, van Sliedregt and Jain. Some aspects of criminalizing such participation in the offence have elicited criticism. See, for example, Ohlin. For an argument that all of these types of liability may be viewed as falling within a unitary theory of perpetration, see Stewart, "The end of 'modes of liability' for international crimes".

[125] *Yearbook ... 1950*, vol. II, p. 377.

30. The Statute of the International Tribunal for the Former Yugoslavia provides that "[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime",[126] and the Statute of the International Tribunal for Rwanda uses virtually identical language.[127] Both tribunals have convicted defendants for participation in the offences within their respective jurisdiction.[128] Similarly, the instruments regulating the Special Court for Sierra Leone,[129] the Special Panels for Serious Crimes in East Timor,[130] the Extraordinary Chambers in the Courts of Cambodia,[131] the Iraqi Supreme Criminal Tribunal[132] and the Extraordinary African Chambers within the Senegalese Judicial System[133] all provide for the criminal responsibility of a person who, in one form or another, participates in the commission of crimes against humanity.

31. In article 2 of its 1996 draft code of crimes against the peace and security of mankind, the Commission provided for several types of individual criminal responsibility relating *inter alia* to crimes against humanity, specifically when a perpetrator:

> (*a*) Intentionally commits such a crime;
>
> (*b*) Orders the commission of such a crime which in fact occurs or is attempted;
>
> (*c*) Fails to prevent or repress the commission of such a crime [when in a superior or command relationship to the offender];
>
> (*d*) Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;
>
> (*e*) Directly participates in planning or conspiring to commit such a crime which in fact occurs;
>
> (*f*) Directly and publicly incites another individual to commit such a crime which in fact occurs;
>
> (*g*) Attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.[134]

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[126] Art. 7, para. 1. Various decisions of the Tribunal have analysed such criminal responsibility. See, for example, *Prosecutor* v. *Duško Tadić, Case No. IT-94-1-A, Judgment of 15 July 1999*, International Tribunal for the Former Yugoslavia, Appeals Chamber, para. 220 (finding "that the notion of common design as a form of accomplice liability is firmly established in customary international law").

[127] Statute of the International Tribunal for Rwanda (see footnote 100 above), art. 6, para. 1.

[128] See, for example, *Prosecutor* v. *Anto Furundžija, Case No. IT-95-17/1-T, Judgment of 10 December 1998*, Trial Chamber II, and ILM, vol. 38, No. 2 (March 1999), para. 246 (finding that "[i]f he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and an abettor").

[129] Statute of the Special Court for Sierra Leone (see footnote 101 above), art. 6, para. 1.

[130] UNTAET/REG/2000/15 (see footnote 102 above), sect. 14.

[131] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (see footnote 103 above), art 29.

[132] Statute of the Iraqi Special Tribunal (see footnote 104 above), art. 15.

[133] Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990 (see footnote 105 above), art. 10.

[134] *Yearbook ... 1996*, vol. II (Part Two), pp. 18–19.

32. The Rome Statute of the International Criminal Court provides for criminal responsibility if the person commits "such a crime … through another person", if the person "[o]rders, solicits or induces the commission of the crime which in fact occurs or is attempted", if the person "[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission" or if the person "[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with common purpose" subject to certain conditions.[135]

33. The concept in these various instruments of "ordering" the crime differs from (and complements) the concept of "command" or other superior responsibility, which the next subsection addresses. Here, "ordering" concerns the criminal responsibility of the superior for affirmatively instructing that action be committed that constitutes an offence. By contrast, command or other superior responsibility concerns the criminal responsibility of the superior for a *failure* to act; specifically, in situations where the superior knew or had reason to know that subordinates were about to commit such acts or had done so, and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators. Further, in these various instruments the allied concepts of "soliciting", "inducing", aiding" and "abetting" the crime include encouraging, requesting or inciting another person to engage in the action that constitutes the offence; these concepts do not require any superior/subordinate relationship.[136]

34. In addressing the breadth of criminal responsibility for "accessorial" participation in the offence, the International Tribunal for the Former Yugoslavia explained in the *Tadić* case that:

> all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice. If this is so, it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. … It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions.[137]

35. Many national laws also provide criminal responsibility for such involvement in the commission of crimes against humanity, using somewhat different terminology and formulations. For example, the Criminal Code of Cuba sets forth various modes of liability for crimes against humanity that extend beyond "commission" of the act, by addressing:

a) Persons who commit the offence themselves

b) Persons who plan an offence and its execution

c) Persons who cause another criminally responsible person to commit an offence

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[135] Art. 25, para. 3(*a*)–(*d*). For commentary, see Finnin.

[136] See, generally, Ambos, "Article 25 …", pp. 743–770; and O'Keefe, pp. 188–192.

[137] *Prosecutor* v. *Duško Tadić* (see footnote 126 above), para. 190. See also *Prosecutor* v. *Radoslav Brđanin, Case No. IT-99-36-A, Judgment of 3 April* 2007, International Tribunal for the Former Yugoslavia, Appeals Chamber; and *Prosecutor* v. *Milan Martić, Case No. IT-95-11-A, Judgment of 8 October* 2008, International Tribunal for the Former Yugoslavia, Appeals Chamber.

> ch) Persons who participate in the execution of a criminal act by carrying out actions without which the act could not have been committed
>
> d) Persons who commit an offence through the agency of another person who is not a perpetrator or who is not subject to penalty, or who is not criminally responsible for the offence because they acted as a result of violence, coercion or deception.[138]

36. Indeed, Cuba asserts that "[i]n the case of offences against humanity, human dignity ... and offences specified in international treaties, all criminally responsible persons shall be considered perpetrators, whatever the nature of their involvement".[139] Other States also address attempt or participation in the commission of crimes against humanity. For example, Finland, allows that "[a]n attempt is punishable" within the section of its legal code applicable to crimes against humanity.[140] The Republic of Korea punishes "[a]ny attempt to commit a crime" constituting a crime against humanity.[141] The United Kingdom "imposes both principal and accessory liability for crimes against humanity. In particular ... the [International Criminal Court (ICC)] Act 2001 makes clear that the following constitute 'ancillary' offences in respect of crimes against humanity: (*a*) aiding, abetting, counselling or procuring the commission of an offence, (*b*) inciting a person to commit an offence, (*c*) attempting or conspiring to commit an offence, or (*d*) assisting an offender or concealing the commission of an offence".[142]

37. In the case of *Zazai* v. *Canada*, a Canadian appellate court explained the nature of complicity in the context of a prosecution for crimes against humanity:

> At common law and under Canadian criminal law, [complicity] was, and still is, a mode of commission of a crime. It refers to the act or omission of a person that helps, or is done for the purpose of helping, the furtherance of a crime. An accomplice is then charged with, and tried for, the crime that was actually committed and that he assisted or furthered. In other words, whether one looks at it from the perspective of our domestic law or of international law, complicity contemplates a contribution to the commission of a crime.[143]

38. Thus, the defendant in that case was found guilty because he

> was willingly and to his benefit a member of an organization that only existed for a limited brutal purpose, i.e. the elimination of anti-government activity and the commission of crimes which amount to or can be characterized as crimes against humanity. He knew that the organization in which he was participating and that he assisted was committing crimes of torture and murder.[144]

39. Treaties addressing crimes other than crimes against humanity typically provide for criminal responsibility of persons who participate in the commission of the offence, using broad terminology that does not seek to require States to alter the preferred terminology or modalities that are well settled in national law. In other

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[138] Written comments to the International Law Commission (2015), Cuba, citing article 18, paragraph 2 of its Criminal Code. See also *ibid.*, Germany, citing section 2, paragraph (5) of its Criminal Code.

[139] *Ibid.*, Cuba, citing article 18, paragraph 4 of its Criminal Code.

[140] *Ibid.*, Finland, citing chapter 11, section 3 of its Criminal Code. See also *ibid.*, Austria, citing section 321b, paragraphs 4–5 of its Criminal Code; Canada, citing the Crimes Against Humanity and War Crimes Act (S.C. 2000, c. 24) of 29 June 2000, section 4, paragraph (1.1), available from laws-lois.justice.gc.ca/eng/acts/C-45.9/FullText.html; and United States Code, Title 18, section 1091.

[141] Written comments to the International Law Commission (2015), the Republic of Korea, citing article 9, paragraph (5) of its Criminal Code. See also *ibid.*, Belgium, citing article 136*sexies–septies* of its Criminal Code.

[142] *Ibid.*, the United Kingdom.

[143] *Zazai* v. *Canada (Minister of Citizenship and Immigration), No. 2005 FCA 303, Judgment of 20 September 2005, Federal Court of Appeal Decisions*, paras. 13–14.

[144] *Ibid.*, para. 26.

words, such treaties use general terms rather than detailed language, allowing States to shape the contours of the criminal responsibility within national statutes or jurisprudence. For example, article 15, paragraph 2, of the 1999 Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, provides:

> Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, *including the rules extending individual criminal responsibility to persons other than those who directly commit the act.**

40. Although the general formulation used in contemporary treaties addressing commission of, attempt to commit and participation in a crime can vary, a succinct recent formulation appears in article 6, paragraph 1(a) of the International Convention for the Protection of All Persons from Enforced Disappearance: "Each State party shall take the necessary measures to hold criminally responsible at least ... [a]ny person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance."

41. Most criminal responsibility under international and national jurisdictions concerns the liability of natural persons, not legal persons (for example, corporations). However, in recent years, corporate criminal liability has become a feature of many national jurisdictions.[145] Moreover, in some of these national jurisdictions, such responsibility exists with respect to international crimes,[146] which has prompted calls for developing the law in this area.[147] Even so, criminal responsibility for corporations is not uniformly recognized worldwide[148] and the approach adopted in jurisdictions where it is recognized can diverge significantly.[149]

42. To date, corporate criminal responsibility has not featured significantly in any of the international criminal courts or tribunals. The Nürnberg Charter authorized the IMT to designate any group or organization as criminal[150] and in the course of the proceedings of the IMT, as well as subsequent proceedings under Control Council Law No. 10,[151] a number of Nazi organizations were so designated.

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[145] See de Doelder and Tiedemann (surveying States generally); Brickey, (discussing the history of corporate criminal responsibility in the United States); Hasnas (same); Gobert and Pascal (assessing corporate criminal liability in 16 European jurisdictions); and Vermeulen, De Bondt and Ryckman (noting that corporate criminal liability did not come to European countries until 1976 in the Netherlands). See also Couturier; Fisse and Braithwaite; Wells; Kyriakakis, "Prosecuting corporations for international crimes..."; Pieth and Ivory; and Stewart, "The turn to corporate criminal liability ...".

[146] See Ramasastry and Thompson (surveying 16 legal systems and finding that corporate criminal responsibility for international crimes is available in many of them). See also Amann; and Stewart, "A pragmatic critique of corporate criminal theory".

[147] See, for example, Clapham, "Extending international criminal law..."; Kelly; Stoitchkova; and van der Wilt, "Corporate criminal responsibility for international crimes".

[148] See, for example, the Harvard Law Review Association, p. 2031 (finding that many States do not recognize corporate liability in their national law).

[149] For example, in Switzerland corporate criminal liability only arises where a crime or misdemeanor committed as part of a business activity cannot be imputed to a particular person associated with the business. See the Criminal Code of Switzerland, art. 102(1), SR 311.0.

[150] Art. 9 ("At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization").

[151] Control Council Law No. 10, in *Trials of War Criminals before the Nuernberg Military Tribunals*, vol. I, Washington D.C., United States Government Printing Office, pp. XVI–XIX.

Ultimately, however, only natural persons were tried and punished by these post-war tribunals.[152] Likewise, the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda did not have any criminal jurisdiction over corporations or other legal persons, nor do the Special Court for Sierra Leone, the Special Panels for Serious Crimes in East Timor, the Extraordinary Chambers in the Courts of Cambodia, the Iraqi Supreme Criminal Tribunal or the Extraordinary African Chambers within the Senegalese Judicial System. The drafters of the Rome Statute of the International Criminal Court noted that "[t]here is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute"[153] and, although proposals for inclusion of a provision on corporate criminal responsibility were made, the Statute ultimately did not contain such a provision.[154]

43. One recent exception, however, appears to be the June 2014 African Union protocol amending the statute of the African Court of Justice and Human Rights; once that protocol enters into force, it will provide jurisdiction to the reconstituted African Court to try corporations for international crimes, including crimes against humanity.[155] Further, although jurisdiction over corporations (or over crimes against humanity) is not expressly provided to the Special Tribunal for Lebanon, an appeals panel of that Tribunal concluded in 2014 that a corporation could be prosecuted for contempt of court (due to an alleged disclosure of the identities of protected witnesses).[156] Among other things, the panel concluded "that the current

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[152] See, for example, *United States* v. *Krauch* et al., ("The I.G. Farben Case"), in *Trials of War Criminals before the Nuernberg Military Tribunals*, vols. VII–VIII, Washington D.C., United States Government Printing Office, 1952. The Tribunal in this case found that "where a private individual or a juristic person becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations". *Ibid.*, vol. VIII, pp. 1132–1133. Further, the tribunal found "that the proof establishes beyond a reasonable doubt that offenses against property as defined in Control Council Law No. 10 were committed by [I.G.] Farben, and that these offenses were connected with, and an inextricable part of the German policy for occupied countries as above described. ... The action of [I.G.] Farben and its representatives, under these circumstances, cannot be differentiated from the acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich." *Ibid.*, p. 1140. Ultimately, however, "the corporate defendant, [I.G.] Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings". *Ibid.*, p. 1153. For analysis of the Nuremberg legacy in this regard, see Bush.

[153] Draft statute for the International Criminal Court, in the Report of the Preparatory Committee on the Establishment of an International Criminal Court (A/CONF.183/2/Add.1), art. 23, para. 6, footnote 3.

[154] See Kyriakakis, "Corporate criminal liability and the ICC Statute".

[155] See Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights as at Thursday 15 May 2014 (STC/Legal/Min/7(I) Rev. 1), art. 46C, paragraph 1 (providing that "[f]or the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States").

[156] *New TV S.A.L. Karma Mohamed Tashin Al Khayat, Case No. STL-14-05/PT/AP/AR126.1, Appeals Panel, Decision of 2 October 2014 on interlocutory appeal concerning personal jurisdiction in contempt proceedings*, Special Tribunal for Lebanon.

international standards on human rights allow for interpreting the term 'person' to include legal entities for the purposes of" contempt jurisdiction.[157]

44. Such criminal responsibility has not been expressly incorporated into many treaties addressing crimes, including the Convention on the Prevention and Punishment of the Crime of Genocide; the Geneva Conventions for the protection of war victims; the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the International Convention for the Protection of All Persons from Enforced Disappearance. Some recent treaties, usually those targeting financial transactions,[158] do call for enactment of national laws addressing corporate responsibility.[159] Even then, however, the relevant provision typically does not require *criminal* sanctions, and instead provides that subject "to the legal principles of the State party, the liability of legal persons may be criminal, civil or administrative".[160]

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[157] *Ibid.*, para. 60. After briefly surveying treaties that refer to corporate criminal responsibility, the Appeals Panel found that "corporate liability for serious harms is a feature of most of the world's legal systems and therefore qualifies as a general principle of law. Where States still differ is whether such liability should be civil or criminal or both. However, the Appeals Panel considers that, given all the developments outlined above, corporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law". *Ibid.*, para. 67.

[158] But see the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, art. I, para. (2) ("The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of *apartheid*").

[159] Basel Convention on the control of transboundary movements of hazardous wastes and their disposal, art. 2, para. 14 ("For the purposes of this Convention: ... 'Person' means any natural or legal person") and art. 4, para. 3 ("The Parties consider that illegal traffic in hazardous wastes or other wastes is criminal").

[160] The International Convention for the Suppression of the Financing of Terrorism, art. 5, para. 1 ("Each State party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence.... Such liability may be criminal, civil or administrative"); the United Nations Convention against Transnational Organized Crime, art. 10, para. 2 ("Subject to the legal principles of the State party, the liability of legal persons may be criminal, civil or administrative."); and the United Nations Convention against Corruption, art. 26, para. 2 (same). See also the Council of Europe Convention on the Prevention of Terrorism, art. 10, para. 2 ("Subject to the legal principles of the Party, the liability of legal entities may be criminal, civil or administrative"); the Convention on combating bribery of foreign public officials in international business transactions, art. 2 ("Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official") and art. 3, para. 3 ("Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable"); and the Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests, art. 3, para. 1 (on liability of legal persons: "Each Member State shall take the necessary measures to ensure that legal persons can be held liable for fraud, active corruption and money laundering committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person"); and art. 4 (on sanctions for legal persons: "Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3 (I) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines").

D. Command or other superior responsibility

45. Separate from the ordering of an individual to commit an offence (addressed in the prior subsection), most jurisdictions impute criminal responsibility to a military commander or other superior for an offence committed by subordinates in certain circumstances, a type of criminal responsibility referred to as "command responsibility" or "superior responsibility".[161] Not all acts committed by subordinates, however, are imputable to those who command them; instead, some form of dereliction of duty by the commander is required. Thus, in the "High Command" case (one of the 12 Nuremberg trials conducted by the United States authorities), the Tribunal noted that:

> A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander in Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations.[162]

46. Notably, the Nürnberg Tribunal and the International Military Tribunal for the Far East used command responsibility with respect to both military and civilian commanders,[163] an approach that influenced later tribunals. As indicated by a Trial Chamber of the International Tribunal for Rwanda in *Prosecutor* v. *Musema*, "[a]s to whether the form of individual criminal responsibility referred to under Article 6(3) of the Statute [of the International Tribunal for Rwanda] also applies to persons in both military and civilian authority, it is important to note that during the trials under the International Military Tribunal for the Far East, civilian authorities were convicted of war crimes under this principle".[164]

47. Indeed, contemporary international criminal courts and tribunals provide for the criminal responsibility of commanders. The Statute of the International Tribunal for the Former Yugoslavia Statute provides that "[t]he fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof",[165] and several defendants have been convicted by the International Tribunal for the Former Yugoslavia on the basis of such command

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[161] For commentary, see Lael; Bantekas, "The contemporary law of superior responsibility"; Damaška; and Sepinwall.

[162] *United States* v. *von Leeb*, et al. ("The High Command Case"), in *Trials of War Criminals before the Nuernberg Military Tribunals*, vol. XI, Washington D.C., United States Government Printing Office, 1950, pp. 543–544.

[163] See, for example, Bassiouni, p. 461; and Heller, pp. 262–263.

[164] *Prosecutor* v. *Musema, Case No. ICTR-96-13-A, Judgment and Sentence of 27 January 2000*, International Tribunal for Rwanda, Trial Chamber I, para. 132.

[165] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (see footnote 99 above), art. 7, para. 3.

responsibility.[166] The same language appears in the Statute of the International Tribunal for Rwanda[167] and that Tribunal has also convicted defendants on the basis of command responsibility.[168] Similar wording appears in the instruments regulating the Special Court for Sierra Leone,[169] the Special Tribunal for Lebanon,[170] the Special Panels for Serious Crimes in East Timor,[171] the Extraordinary Chambers in the Courts of Cambodia,[172] the Iraqi Supreme Criminal Tribunal[173] and the Extraordinary African Chambers within the Senegalese Judicial System.[174]

48. The Commission's 1996 draft code of crimes against the peace and security of mankind stated in its article 6:

> The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.[175]

49. Article 28 of the Rome Statute of the International Criminal Court[176] contains a detailed standard by which criminal responsibility applies to a military commander or person effectively acting as a military commander in regard to the acts of others.[177] As a general matter, criminal responsibility arises when: (*a*) there is a relationship of subordination; (*b*) the commander knew or should have known that his subordinates

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[166] See, for example, *Prosecutor* v. *Aleksovski, Case No. IT-95-14/1-T, Judgment of 25 June 1999*, International Tribunal for the Former Yugoslavia, Trial Chamber, *Judicial Reports 1999*, pp. 535–761, at pp. 565–573, paras. 66–77; and *Prosecutor* v. *Delalić* et al., *Case No. IT-96-21-T, Judgment of 16 November 1998*, International Tribunal for the Former Yugoslavia, Trial Chamber, paras. 330–400 and 605–810.

[167] Statute of the International Tribunal for Rwanda (see footnote 100 above), art. 6, para. 3.

[168] See *Prosecutor* v. *Akayesu, Case No. ICTR-96-4, Judgment of 2 September 1998*, International Tribunal for Rwanda, Trial Chamber; and *Prosecutor* v. *Kambanda, Case No. ICTR-97-23-S, Judgment and Sentence of 4 September 1998*, International Tribunal for Rwanda, Trial Chamber.

[169] Statute of the Special Court for Sierra Leone (see footnote 101 above), art. 6, para. 3.

[170] Statute of the Special Tribunal for Lebanon (S/RES/1757 (2007), attachment), art. 3, para. 2.

[171] UNTAET/REG/2000/15 (see footnote 102 above), sect. 16.

[172] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (see footnote 103 above), art. 29.

[173] Statute of the Iraqi Special Tribunal (see footnote 104 above), art. 15.

[174] Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990 (see footnote 105 above), art. 10, para. 4.

[175] Draft code of crimes against the peace and security of mankind (see footnote 134 above), p. 25.

[176] Article 28, entitled "Responsibility of commanders and other superiors", provides in paragraph (a), that:

> "A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
>
> "(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
>
> "(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

[177] See, for example, *Prosecutor* v. *Kordić and Čerkez, Case. No. IT-95-14/2-T, Judgment of 26 February 2001*, International Tribunal for the Former Yugoslavia, Trial Chamber, para. 369 ("It should be emphasised that the doctrine of command responsibility does not hold a superior responsible merely because he is in a position of authority as, for a superior to be held liable, it is necessary to prove that he 'knew or had reason to know' of the offences and failed to act to prevent or punish their occurrence. Superior responsibility, which is a type of imputed responsibility, is therefore not a form of strict liability").

were committing or about to commit the offence; and (*c*) the commander failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter for investigation and prosecution. This standard has begun influencing the development of "command responsibility" theory in national legal systems, in both the criminal and civil contexts.[178]

50. Article 28 also addresses the issue of "superior and subordinate relationships" arising in a non-military or civilian context. Such superiors include civilians that "lead" but are not "embedded" in military activities.[179] Here, criminal responsibility arises when: (*a*) there is a relationship of subordination; (*b*) the civilian superior knew or consciously disregarded information about the offences; (*c*) the offences concerned activities that were within the effective responsibility and control of the superior; and (*d*) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress commission of all the offences or to submit the matter for investigation and prosecution.[180]

51. National laws also contain this type of criminal responsibility for war crimes, genocide, and crimes against humanity, but slightly differing standards are used among States that sometimes do not replicate the standard of the Rome Statute of the International Criminal Court. For example, the national law of Canada provides:

> A superior commits an indictable offence if the superior fails to exercise control properly over a person under their effective authority and control ...; the superior knows that the person is about to commit or is committing such an offence, or consciously disregards information that clearly indicates that such an offence is about to be committed or is being committed by the person; the offence relates to activities for which the superior has effective authority and control; and the superior subsequently fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences.[181]

A number of other States make similar provisions, including Australia,[182] France,[183] Germany,[184] Malta,[185] the Netherlands,[186] New Zealand,[187] Spain,[188] the United

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[178] See, for example, *Ford* v. *Garcia*, 289 F.3d 1283 (11th Cir. 2002); see also Van Schaack, p. 1217.

[179] Ronen, p. 347.

[180] Article 28, paragraph (b) provides that:

"With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

"(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

"(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

"(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

[181] Crimes Against Humanity and War Crimes Act (S.C. 2000, c. 24) of 29 June 2000, sect. 5(2)(*a*)–(*d*), available from laws-lois.justice.gc.ca/eng/acts/C-45.9/FullText.html.

[182] International Criminal Court (Consequential Amendments) Act 2002, No. 42, 2002, article 268.115, available from www.comlaw.gov.au/Details/C2004A00993.

[183] Written comments to the International Law Commission (2015), France, citing article 214-4-1 of its Criminal Code.

[184] Act to Introduce the Code of Crimes Against International Law of 26 June 2002, sects.4, 13 and 14, available from www.iuscomp.org/gla/statutes/VoeStGB.pdf.

[185] International Criminal Court Act, Act XXIV of 2002, part 54E, available from www.iccnow.org/documents/MaltaDraftICCImpLeg.pdf.

[186] Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law (International Crimes Act), sect. 9, available from www.icrc.org/applic/ihl/ihl-nat.nsf/0/2a6d559625223f62c12577d0003be499/$FILE/60466371.pdf/Netherlands%20International%20Crimes%20Act%202003%20EN.pdf.

Kingdom,[189] the United States of America[190] and Uruguay.[191] Some States, such as Argentina[192] and Ecuador,[193] that recently adopted laws to implement the Rome Statute of the International Criminal Court, do not address in those laws the issue of command responsibility.

52. Military manuals adopted by States also identify this form of criminal responsibility. For example, the Military Manual of Argentina provides: "Breaches committed by a subordinate do not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew that the subordinate was committing or was going to commit the breach and if they did not take the measures within their power to prevent or repress the breach."[194] Other examples may be found in the military manuals of Cameroon,[195] France,[196] the Russian Federation,[197] Ukraine,[198] the United Kingdom[199] and the United States of America.[200]

53. Treaties addressing offences other than crimes against humanity also often acknowledge command responsibility. While the Convention on the Prevention and Punishment of the Crime of Genocide and the Geneva Conventions for the protection of war victims do not do so, the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), provides a general formula in article 86, paragraph 2, which has been accepted by its 174 States parties. That provision reads:

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[187] International Crimes and International Criminal Court Act of 6 September 2000, sect. 12, available from www.legislation.govt.nz/act/public/2000/0026/latest/DLM63091.html.

[188] Written comments to the International Law Commission (2015), Spain, citing article 451 of its Criminal Code.

[189] International Criminal Court Act 2001, sect. 65, available from www.legislation.gov.uk/ukpga/2001/17/contents.

[190] Principals, United States Code, Title 10, sect. 950q (2012), available from www.gpo.gov/fdsys/pkg/USCODE-2014-title10/pdf/USCODE-2014-title10-subtitleA-partII-chap47A-subchapVIII-sec950q.pdf.

[191] Ley No. 18.026, Cooperación con la Corte Penal Internacional en materia de lucha contra el genocidio, los crímenes de guerra y de lesa humanidad, 4 October 2006, art. 10, available from www.parlamento.gub.uy/leyes/AccesoTextoLey.asp?Ley=18026&Anchor=.

[192] Ley 26.200, Ley de implementación del Estatuto de Roma de la Corte Penal, 5 January 2007, available from www.infoleg.gov.ar/infolegInternet/anexos/120000-124999/123921/norma.htm.

[193] Código Orgánico Integral Penal, 2014, available from www.justicia.gob.ec/wp-content/uploads/2014/05/c%C3%B3digo_org%C3%A1nico_integral_penal_-_coip_ed._sdn-mjdhc.pdf.

[194] Argentina, *Leyes de Guerra*, PC-08-01, Público, Edición 1989, Estado Mayor Conjunto de las Fuerzas Armadas, aprobado por Resolución No. 489/89 del Ministerio de Defensa, 23 Apr. 1990, sect. 8.07 (see www.icrc.org/customary-ihl/eng/docs/v2_cou_ar_rule153).

[195] *Droit des conflits armés et droit international humanitaire, Manuel de l'instructeur en vigueur dans les forces de défense*, Ministère de la Défense, Présidence de la République, Etat-major des Armées (2006), p. 296, sect. 662 (see www.icrc.org/customary-ihl/eng/docs/v2_cou_cm_rule153).

[196] *Manuel de droits des conflits armés*, Ministère de la Défense (2001), p. 113 (see www.icrc.org/customary-ihl/eng/docs/v2_cou_fr_rule153).

[197] *Instructions on the Application of the Rules of International Humanitarian Law by the Armed Forces of the USSR*, Appendix to Order of the USSR Defence Minister No. 75 (1990), sect. 14(*b*) (see www.icrc.org/customary-ihl/eng/docs/v2_cou_ru_rule153).

[198] *Manual on the Application of IHL Rules*, Ministry of Defence (2004), sect. 1.8.8 (see www.icrc.org/customary-ihl/eng/docs/v2_cou_ua_rule153).

[199] *The Law of War on Land being Part III of the Manual of Military Law*, The War Office, HMSO (1958), sect. 631 (see www.icrc.org/customary-ihl/eng/docs/v2_cou_gb_rule153).

[200] *Department of Defense Law of War Manual*, Office of General Counsel, Department of Defense, sect. 18.23.3.2 (June 2015), available from www.defense.gov/pubs/Law-of-War-Manual-June-2015.pdf.

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[201]

54. As such, national laws and international instruments relating to crimes against humanity, as well as relevant treaties addressing other crimes, typically include — as one facet of participation in the commission of the offence — the possibility of imputation of criminal responsibility to a military commander or other superior for acts committed by subordinates, in circumstances where the superior has been derelict in his or her duties.

E. Superior orders

55. All jurisdictions that address crimes against humanity permit grounds for excluding criminal responsibility to one degree or another. For example, most jurisdictions preclude criminal responsibility if the alleged perpetrator suffers from a mental disease that prevents the person from appreciating the unlawfulness of his or her conduct.[202] Some jurisdictions provide that a state of intoxication also precludes criminal responsibility, at least in some circumstances.[203] Action taken in self-defence can also preclude responsibility,[204] as well as duress resulting from a threat of imminent harm or death.[205] In some instances, the person must have achieved a certain age to be criminally responsible.[206] The exact grounds vary by jurisdiction and, with respect to national systems, are usually embedded in that

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[201] Provisions on command responsibility also appear in the International Convention for the Protection of All Persons from Enforced Disappearance, article 6, paragraph 1, of which provides:

> "Each State party shall take the necessary measures to hold criminally responsible at least:
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> "....
>
> "(*b*) A superior who:
>
> "(i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;
>
> "(ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and
>
> "(iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;
>
> "(*c*) Subparagraph (*b*) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander."

[202] See, for example, the Rome Statute of the International Criminal Court, article 31, paragraph 1(*a*); the Criminal Code of the Republic of Croatia (footnote 64 above), art. 40; and the Criminal Code of the Republic of Finland (1889) (amended 2012), chap. 3, sects. 4(2)–(3), available from http://www.legislationline.org/documents/section/criminal-codes/country/32.

[203] See for example, the Rome Statute of the International Criminal Court, article 31, paragraph 1(*b*); the Criminal Code of the Republic of Croatia (footnote 64 above), art. 41; and the Criminal Code of the Republic of Finland (footnote above), chap. 3, sect. 4(4).

[204] See the Rome Statute of the International Criminal Court, article 31, paragraph 1(*c*); the Criminal Code of the Republic of Croatia (footnote 64 above), arts. 29–30; and the Criminal Code of the Republic of Finland, chap. 4, sect. 4 (footnote 202 above).

[205] See the Rome Statute of the International Criminal Court, article 31, paragraph 1(*d*); the Criminal Code of the Republic of Croatia (footnote 64 above), art. 31; and the Criminal Code of Finland (footnote 202 above), chap. 4, sect. 5.

[206] See the Rome Statute of the International Criminal Court, article 26; the Criminal Code of the Republic of Croatia (footnote 64 above), art. 10; and the Criminal Code of Finland (footnote 202 above), chap. 3, sect. 4(1).

jurisdiction's approach to criminal responsibility generally, not just in the context of crimes against humanity.[207]

56. At the same time, most jurisdictions that address crimes against humanity provide that perpetrators of such crimes cannot invoke as a defines that they were ordered by a superior to commit the offence.[208] Article 8 of the Nürnberg Charter provides: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires". Consequently, in conformity with article 8 and "with the law of all nations", the IMT found: "The fact that the Defendant acted pursuant to an order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment."[209]

57. Likewise, article 6 of the Charter of the International Military Tribunal for the Far East provides: "Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

58. The Commission's 1996 draft code of crimes against the peace and security of mankind provides in article 5: "The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires."[210] The Commission noted in regard to this article:

> the culpability and the indispensable role of the subordinate who actually commits the criminal act cannot be ignored. Otherwise the legal force and effect of the prohibition of crimes under international law would be substantially weakened by the absence of any responsibility or punishment on the part of the actual perpetrators of these heinous crimes and thus of any deterrence on the part of the potential perpetrators thereof.[211]

59. While article 33 of the Rome Statute of the International Criminal Court allows for a limited superior orders defines, it does so exclusively with respect to war crimes; orders to commit acts of genocide or crimes against humanity do not fall within the scope of the exception (art. 33).[212] The instruments regulating the International Tribunal for the Former Yugoslavia,[213] the International Tribunal for Rwanda,[214] the Special Court for Sierra Leone,[215] the Special Tribunal for

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[207] See the draft code of crimes against the peace and security of mankind (footnote 134 above), p. 23, and p. 42, article 15 ("In passing sentence, the court shall, where appropriate, take into account extenuating circumstances in accordance with the general principles of law") and the commentary thereto.

[208] See, generally, D'Amato, pp. 288–289; and Nowak and McArthur, p. 102.

[209] "Judicial decisions: International Military Tribunal (Nuremberg) ...", p. 221.

[210] Draft code of crimes against the peace and security of mankind (see footnote 134 above), p. 23 (art. 5); see also the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *Yearbook ... 1950*, vol. II, p. 375 (Principle IV).

[211] Draft code of crimes against the peace and security of mankind (see footnote 134 above), p. 24.

[212] For analysis, see Gaeta; and Cryer, pp. 768–769.

[213] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (see footnote 99 above), art. 7, para. 4.

[214] Statute of the International Tribunal for Rwanda (see footnote 100 above), art. 6, para. 4.

[215] Statute of the Special Court for Sierra Leone (see footnote 101 above), art. 6, para. 4.

Lebanon,[216] the Special Panels for Serious Crimes in East Timor,[217] the Extraordinary Chambers in the Courts of Cambodia,[218] the Iraqi Supreme Criminal Tribunal[219] and the Extraordinary African Chambers within the Senegalese Judicial System[220] all similarly exclude superior orders as a defines. The 2005 ICRC Study of Customary International Humanitarian Law, in Rule 155, provides: "Obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful or should have known because of the manifestly unlawful nature of the act ordered."[221]

60. Such exclusion of superior orders as a defines exists in a range of treaties addressing crimes, such as: the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[222] the Inter-American Convention to Prevent and Punish Torture;[223] the Inter-American Convention on the Forced Disappearance of Persons;[224] and the International Convention for the Protection of All Persons from Enforced Disappearance.[225] In the context of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Committee against Torture has criticized national legislation that permits such a defines or is ambiguous on the issue. Thus, in evaluating the performance of Guatemala in 2006, the Committee stated: "The State party should amend its legislation in order to explicitly provide that an order from a superior officer or a public authority may not be invoked as a justification of torture."[226] Among other things, the Committee indicated that it was "concerned that the requirement ... of the Convention [on this point was] expressed ambiguously in the State party's legislation".[227] In some instances, the problem arises from the presence in a State's national law of what is referred to as a "due obedience" defines.[228] For example, when reviewing in 2004 the implementation of the Convention by Chile, the

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[216] Statute of the Special Tribunal for Lebanon (see footnote 170 above), art. 3, para. 3.

[217] UNTAET/REG/2000/15 (see footnote 102 above), sect. 21.

[218] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (see footnote 103 above), art. 29.

[219] Statute of the Iraqi Special Tribunal (see footnote 104 above), art. 15.

[220] Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990 (see footnote 105 above), art. 10, para. 5.

[221] See ICRC, Customary IHL Database, "Chapter 43: Practice relating to Rule 155. Defence of superior orders", available from www.icrc.org/customary-ihl/eng/docs/v1_rul_rule155.

[222] Art. 2, para. 3 ("An order from a superior officer or a public authority may not be invoked as a justification of torture").

[223] Art. 4 ("The fact of having acted under orders of a superior shall not provide exemption from the corresponding criminal liability").

[224] Art. VIII ("The defense of due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearance shall not be admitted. All persons who receive such orders have the right and duty not to obey them").

[225] Art. 6, para. 2 ("No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance"). This provision "received broad approval" at the drafting stage. See Commission on Human Rights, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), para. 72; see also the Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992, article 6.

[226] Conclusions and recommendations of the Committee against Torture, Guatemala (CAT/C/GTM/CO/4 and Add.1), para. 13.

[227] *Ibid.*

[228] Nowak and McArthur, p. 102.

Committee against Torture expressed concern about "[t]he continued provision, in articles ... of the Code of Military Justice, of the principle of due obedience, notwithstanding provisions affirming a subordinate's right to protest against orders that might involve committing a prohibited act".[229]

61. While superior orders are not permitted as a defines to prosecution for an offence, some of the international and national jurisdictions mentioned above allow orders from a superior to serve as a mitigating factor at the sentencing stage. Article 5 of the draft code of crimes against the peace and security of mankind indicated this when it stated that action pursuant to an order "may be considered in mitigation of punishment if justice so requires".[230] In its commentary to that provision, the Commission stated:

> a subordinate who unwillingly commits a crime pursuant to an order of a superior because of the fear of serious consequences for himself or his family resulting from a failure to carry out that order does not incur the same degree of culpability as a subordinate who willingly participates in the commission of the crime. The fact that a subordinate unwillingly committed a crime pursuant to an order of a superior to avoid serious consequences for himself or his family resulting from the failure to carry out that order under the circumstances at the time may justify a reduction in the penalty that would otherwise be imposed to take into account the lesser degree of culpability. The phrase "if justice so requires" is used to show that even in such cases the imposition of a lesser punishment must also be consistent with the interests of justice.[231]

62. As suggested by this text, statutes of various international criminal tribunals have recognized the relevance of superior orders at the sentencing stage.[232] However, the Rome Statute of the International Criminal Court does not address whether a superior order is relevant at the sentencing stage. The ICRC Study concluded that "there is extensive State practice to this effect in military manuals, national legislation and official statements", but also found that some States "exclude mitigation of punishment for violations committed pursuant to manifestly unlawful orders".[233]

F. Statute of limitations

63. One possible restriction on the prosecution of a person for crimes against humanity concerns the application of a "statute of limitations" ("period of prescription"), meaning a rule that forbids prosecution of an alleged offender for a crime that was committed more than a specified number of years prior to the initiation of the prosecution.[234] The purpose of such a rule is principally to limit the

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[229] Conclusions and recommendations of the Committee against Torture, Chile (CAT/C/CR/32/5), para. 6(i). See also the Conclusions and recommendations of the Committee against Torture, Argentina (CAT/C/CR/33/1), para. 3(a) (praising Argentina for declaring its Due Obedience Act "absolutely null and void").

[230] See the draft code of crimes against the peace and security of mankind (footnote 134 above), p. 23.

[231] *Ibid.*, p. 24, para. (5). See also D'Amato, p. 288.

[232] For provisions allowing mitigation at the sentencing stage, see the Nürnberg Charter, article 8; Charter of the International Military Tribunal for the Far East, art. 6; Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (see footnote 99 above), art. 7, para. 4; Statute of the International Tribunal for Rwanda (footnote 100 above), art. 6, para. 4; Statute of the Special Court for Sierra Leone (see footnote 101 above), art. 6, para. 4; and the instrument regulating the Special Panels for Serious Crimes in East Timor, UNTAET/REG/2000/15 (footnote 102 above), sect. 21.

[233] See footnote 221 above.

[234] See, generally, Kok.

pursuit of prosecutions to a time when the physical and eyewitness evidence remains fresh and has not deteriorated.

64. No rule on statute of limitations with respect to international crimes, including crimes against humanity, was established in the Nürnberg Charter or the Charter of the International Military Tribunal for the Far East, or in the constituent instruments of the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda or the Special Court for Sierra Leone.[235] By contrast, Control Council Law No. 10, adopted in 1945 by the Allied Powers occupying Germany to ensure the continued prosecution of alleged offenders, provided that in any trial or prosecution for crimes against humanity (as well as war crimes, and crimes against the peace) "the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to 1 July 1945".[236] Likewise, the Rome Statute of the International Criminal Court expressly addresses the matter, providing that "[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations" (art. 29). The drafters of the Statute strongly supported this provision as applied to crimes against humanity.[237] Similarly, the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia and the instruments regulating the Iraqi Supreme Criminal Tribunal and the Special Panels for Serious Crimes in East Timor all explicitly defined crimes against humanity as offences for which there was no statute of limitations.[238]

65. With respect to whether a statute of limitations may apply to the prosecution of an alleged offender in national courts, in 1967 the General Assembly of the United Nations asserted that "the application to war crimes and crimes against humanity of the rule of municipal law relating to the period of limitation for ordinary crimes is a matter of serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes".[239] The following year, States adopted the 1968 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, which requires State Parties to adopt "any legislative or other means necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment" of these two types of crimes (art. IV). Similarly, in 1974, the Council of Europe adopted the European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, which uses substantially the same language. These conventions, however, have secured limited adherence; as of 2015, fifty-five States are parties to the 1968 Convention, while eight States are parties to the 1974 Convention.

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[235] See Schabas, *The International Criminal Court*...), p. 429, and "Article 29".

[236] Control Council Law No. 10 (see footnote 150 above), p. 52, art. II, para. 5.

[237] *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998, vol. II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.183/13 (Vol. II)), 2nd meeting, paras. 45–74. See also Schabas, *The International Criminal Court*..., p. 469 (citing A/CONF.183/C.1/SR.8, paras. 76 and 82).

[238] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (see footnote 103 above), art. 5; Statute of the Iraqi Special Tribunal (see footnote 104 above), art. 17(*d*); and the instrument regulating the Special Panels for Serious Crimes in East Timor UNTAET/REG/2000/15 (see footnote 102 above), sect. 17.1. Further, it should be noted that the Extraordinary Chambers in the Courts of Cambodia was provided jurisdiction over crimes against humanity committed decades prior to its establishment, in 1975–1979, when the Khmer Rouge held power.

[239] General Assembly resolution 2338 (XXII) of 18 December 1967. See also General Assembly resolutions 2712 (XXV) of 15 December 1970 and 2840 (XXVI) of 18 December 1971.

66. At the same time, there appears to be no State with a law on crimes against humanity which also bars prosecution after a period of time has elapsed.[240] Rather, numerous States have specifically legislated against any such limitation, including Albania, Argentina, Belgium, Bosnia and Herzegovina, Burundi, the Central African Republic, Cuba, Estonia, Ethiopia, France, Germany, Hungary, Israel, Mali, the Netherlands, Niger, Peru, Poland, the Republic of Korea, Latvia, the Russian Federation, Rwanda, Spain, Ukraine, Uruguay and Uzbekistan.[241] For example, in 1964, France enacted a law providing that crimes against humanity as defined by General Assembly resolution 3(I) of 13 February 1946 (concerning the extradition and punishment of war criminals from the Second World War) and the Nürnberg Charter "are imprescriptible by their nature".[242] In the following decades, France prosecuted several persons for crimes against humanity committed many years earlier, during the Second World War, such as Klaus Barbie, Maurice Papon and Paul Touvier. In the *Barbie* case, the French *Cour de Cassation* determined that "the prohibition on statutory limitations for crimes against humanity is now part of customary law".[243]

67. Other national courts have also addressed questions as to whether allegations of crimes against humanity are time-barred. The Jerusalem District Court in the *Eichmann* case rejected the defendant's argument that his prosecution was time-barred: "Because of the extreme gravity of the crime against the Jewish People, the crime against humanity and war crime, the Israeli legislator has provided that such crimes shall never prescribe."[244] The Special Prosecutor's Office noted during the *Mengistu* trial that, under the Constitution of Ethiopia, "no statutory limitation shall apply to crimes against humanity. This concept emanates from internationally

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[240] Schabas, *The International Criminal Court*, p. 469.

[241] See the Criminal Code of Albania (footnote 89 above), art. 67; Argentina, Law concerning the Imprescriptibility of War Crimes and Crimes Against Humanity (1995); the Criminal Code of Belgium, art. 91 (1867, as amended on 5 August 2003); the Criminal Code of Bosnia and Herzegovina, art. 19 (2003); the Criminal Code of Burundi, arts. 150 and 155 (2009); the Criminal Procedure Code of the Central African Republic, art. 7(c) (2010); Cuba (footnote 65 above), art. 64, para. 5; the Criminal Code of Estonia, sect.81, para. (2) (2002); Ethiopia, Constitution, art. 28, para. 1 (1994); France, Criminal Code art. 213-5 (1994); Germany (footnote 68 above), art. 1, sect. 5; Hungary, Act IV of 1978 on the Criminal Code, art. 33, para. (2) (as amended in 1998); Israel, Nazis and Nazi Collaborators (Punishment) Law, art. 12 (1950); the Criminal Code of Latvia, sect. 57 (2000); the Criminal Code of Mali, art. 32 (2001); the Netherlands, International Crimes Act, sect. 13 (2003); the Criminal Code of Niger, art. 208.8 (1961, as amended in 2003); Peru, Legislative Resolution No. 27998, art. 1 (2003) and Presidential Decree No. 082-2003-RE, art. 1 (2003); the Criminal Code of Poland, art. 109 (1997); the Republic of Korea, Act on the Punishment of Crimes within the Jurisdiction of the International Criminal Court, art. 6 (2007); the Russian Federation, Decree on the Punishment of War Criminals (1965); the Constitution of Rwanda, art. 13 (2003); the Criminal Code of Spain, art. 131, para. 4 (1995, as amended on 23 June 2010); the Criminal Code of Ukraine, art. 49, para. 5 (2010); Uruguay, Law on Cooperation with the ICC, art. 7 (2006); and the Criminal Code of Uzbekistan, art. 64 (1994). See, generally, ICRC, Practice relating to Rule 160. Statutes of Limitation, available from www.icrc.org/customary-ihl/eng/docs/v2_rul_rule160.

[242] France, Law No. 64-1326 (26 December 1964).

[243] *Fédération nationale des déportés et internés résistants et patriotes* et al. v. *Barbie*, *Judgment of 20 December 1985*, France, Court of Cassation (Criminal Chamber), ILR, vol. 78 (1988), pp. 125–131.

[244] *The Attorney-General of the Government of Israel* v. *Eichmann, Criminal Case No. 40/61, Judgment of 11 December 1961*, District Court of Jerusalem, para. 53. See also Ambos, *Treatise on International Criminal Law*, p. 428.

recognized principles".[245] In the *In re Agent Orange Product Liability Litigation* case, a United States federal district court asserted that the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity and the Rome Statute of the International Criminal Court "suggest the need to recognize a rule under customary international law that no statute of limitations should be applied to war crimes and crimes against humanity".[246] The Supreme Court of Argentina has ruled that a statute of limitations will not apply to war crimes and crimes against humanity as a matter of customary international law and *jus cogens* principles.[247]

68. Many treaties addressing other crimes in national law have not contained a prohibition on a statute of limitations. For example, the Commission proposed in its draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons to include an article 9 reading: "The statutory limitation as to the time within which prosecution may be instituted for the crimes set forth in article 2 shall be, in each State party, that fixed for the most serious crimes under its internal law."[248] States, however, declined to include that provision in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also contains no prohibition on the application of a statute of limitations to torture-related offences, but the Committee against Torture has asserted that, taking into account their grave nature, such offences should not be subject to any statute of limitations.[249] Similarly, while the International Covenant on Civil and Political Rights does not directly address the issue, the Human Rights Committee has called for the abolition of statutes of limitations in relation to serious violations of the Covenant.[250]

69. The International Convention for the Protection of All Persons from Enforced Disappearance does address the issue of statute of limitations, providing that "[a] State party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings ... [i]s of long duration and is proportionate to the extreme seriousness of this offence".[251] The *travaux préparatoires* for the Convention indicates that this provision was intended to distinguish between those offences that might constitute a crime against humanity — for which there should be no statute of

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[245] *Ethiopia* v. *Mengistu and Others, Reply submitted by the Special Prosecutor in response to the objection filed by counsels by defendants (23 May 1995)*, Ethiopia, Special Prosecutor's Office, sect. 6.1.1.

[246] *In re Agent Orange Product Liability Litigation*, 373 F.Supp.2d 7 (E.D.N.Y. 2005), at p. 63.

[247] *Office of the Prosecutor* v. *Priebke (Erich), Case No. P/457/XXXI, Ordinary Appeal Judgment, Request of Extradition, 2 November 1995*, Supreme Court of Argentina.

[248] *Yearbook ... 1972*, vol. II, p. 320.

[249] See, for example, Consideration of reports submitted by States parties under article 19 of the Convention, concluding observations of the Committee against Torture, Montenegro (CAT/C/MNE/CO/1 and Add.1); and Consideration of reports submitted by States parties under article 19 of the Convention, conclusions and recommendations, Italy (CAT/C/ITA/CO/4), para. 19.

[250] See, for example, Consideration of reports submitted by States parties under article 40 of the Covenant, concluding observations of the Human Rights Committee, Panama (CCPR/C/PAN/CO/3), para. 7.

[251] Art. 8, para. 1(*a*). By contrast, the Inter-American Convention on Forced Disappearance of Persons provides that criminal prosecution and punishment of all forced disappearances shall not be subject to statutes of limitations (art. VII).

limitations — and all other offences under the Convention.[252] Specifically, the drafters of the International Convention for the Protection of All Persons from Enforced Disappearance appeared to hold a consensus opinion that:

> In international law, there should be no statute of limitations for enforced disappearances which constituted crimes against humanity. Where enforced disappearances constituting offences under ordinary law were concerned, the longest limitation period stipulated in domestic law should be applied — or, in any event, a limitation period commensurate with the seriousness of the crime.[253]

70. One of the key issues identified by States for not joining the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity was a concern with the retroactive effect of the prohibition on a statute of limitations. Article I of the Convention prohibited a statute of limitations "irrespective of their date of commission" (art. I), thereby requiring States parties to abolish statutory limitations with retroactive effect. An alternative approach to such a prohibition in a new convention would be to prohibit statutory limitations, but not with retroactive effect, either by affirmatively stating as much or by not addressing the issue. Article 28 of the Vienna Convention on the Law of Treaties provides that "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party".[254] The ICJ applied article 28 in the context of a treaty addressing a crime (torture) in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* finding that the "the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned".[255] Thus, without a clearly stated contrary intention, a treaty will generally not apply to actions taken entirely prior to the State's acceptance of the treaty.[256]

71. At the same time, article 28 does not apply to continuing incidents that have not ended before the entry into force of the treaty.[257] As the Commission noted in 1966:

> if … an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty. The non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date.[258]

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[252] Commission on Human Rights, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2003/71), paras. 43–46 and 56.

[253] *Ibid.*, para. 56.

[254] See also the draft code of crimes against the peace and security of mankind (footnote 134 above), article 13, paragraph 1, p. 32 ("No one shall be convicted under the present Code for acts committed before its entry into force").

[255] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (see footnote 98 above), p. 457, para. 100. See also *O. R., M. M. and M. S.* v. *Argentina*, Communications Nos. 1/1988, 2/1988 and 3/1988, Views of the Committee against Torture of 23 November 1989, *Official Documents of the General Assembly, Forty-Fifth Session, Supplement No. 44* (A/45/44), annex V, p. 112, para. 7.5 (finding that "'torture' for purposes of the Convention can only mean torture that occurs subsequent to the entry into force of the Convention").

[256] Crawford, p. 378; Shaw, p. 671; and *Yearbook … 1966*, vol. II, at pp. 211–213.

[257] Odendahl, p. 483.

[258] *Yearbook … 1966*, vol. II, p. 212, para. (3) of the commentary to draft article 24.

72. The European Court of Human Rights and the Human Rights Committee have both followed this approach, such that if there is a "continuing violation" of human rights, not simply an "instantaneous act or fact" with continuing effects, then the Court and the Committee view the matter as within the scope of their jurisdiction.[259] According to the Court, "the concept of a 'continuing situation' refers to a state of affairs which operates by continuous activities by or on the part of the State to render the applicants victims".[260] The Human Rights Committee has "declared that it could not consider an alleged violation of human rights said to have taken place prior to the entry into force of the Covenant for a State party, unless it is a violation that continues after that date or has effects which themselves constitute a violation of the Covenant after that date".[261]

73. Further, while the obligations for the State under a new convention would only operate with respect to acts or facts that arise after the convention enters into force for that State, the convention (at least as currently reflected in the present draft articles) would not address, one way or the other, the manner in which a State applies its law to crimes against humanity arising prior to that time. A State that previously possessed the capacity to prosecute crimes against humanity with respect to acts or facts pre-dating the convention would remain able to do so after entry into force of the convention. In other words, while such prosecutions would fall outside the scope of the convention, the convention would not preclude them. For those States, a relevant limitation on its capacity to prosecute for such crimes might be the date on which the State enacted its national law on crimes against humanity, since international law and most national legal systems preclude punishment for an act that was not criminal at the time it was committed.[262] Even then, however, there is support for the proposition that crimes against humanity committed prior to enactment of a national law criminalizing such conduct nevertheless might be nationally prosecuted, since such acts have been regarded as criminal under international law at least since the Second World War.[263]

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[259] See *Loizidou* v. *Turkey (Article 50) (40/1993/435/514), Grand Chamber judgment of 28 July 1998*, European Court of Human Rights; *Kalashnikov* v. *Russia, Application no. 47095/99, Chamber judgment of 15 July 2002*, European Court of Human Rights, Third Section, para. 111; *Posti and Rahko* v. *Finland, Application no. 27824/95, Chamber judgment of 24 September 2002*, European Court of Human Rights, Fourth Section, para. 39; *Blečić* v. *Croatia, Application no. 59532/00, Chamber judgment of 29 July 2004*, European Court of Human Rights, First Section, paras. 73 *et seq*; and *Gueye* et al. v. *France*, Communication No. 196/1985, Views of the Human Rights Committee, *Official Records of the General Assembly, Forty-Fourth Session, Supplement No. 40* (A/44/40), pp. 189 and 191–192.

[260] *Posti and Rahko* v. *Finland* (see footnote above), para. 39.

[261] *Gueye* et al. v. *France* (see footnote 259 above), pp. 191–192, para. 5.3.

[262] In this regard, reference is often made to the prohibition of *ex post facto* (after the facts) laws or to the doctrine of *nullum crimen, nulla poena sine praevia lege poenali* ("[there exists] no crime [and] no punishment without a pre-existing penal law [appertaining]").

[263] See, for example, *Kolk and Kislyiy* v. *Estonia, Application nos. 23052/04 and 24018/04, Decision on admissibility of 17 January* 2006, European Court of Human Rights, Fourth Section (denying applicants' claim that their convictions for crimes against humanity transgressed article 7 of the European Convention on Human Rights, which prohibits retrospective application of criminal law, because "even if the acts committed by the applicants could have been regarded as lawful under the Soviet law at the material time, they were nevertheless found by Estonian courts to constitute crimes against humanity under international law at the time of their commission"). See also *Penart* v. *Estonia, Application no. 14685/04, Decision on admissibility of 24 January 2006*, European Court of Human Rights, Fourth Section (same); *Kononov* v. *Latvia, Application no. 36376/04, Judgment of 17 May 2010*, European Court of Human Rights, Grand Chamber (same but with respect to war

G. Appropriate penalties

74. The Commission provided in its 1996 draft Code of crimes against the peace and security of Mankind that "[a]n individual who is responsible for a crime against the peace and security of mankind shall be liable to punishment. The punishment shall be commensurate with the character and gravity of the crime".[264] The commentary further explained that the "character of a crime is what distinguishes that crime from another crime... The gravity of a crime is inferred from the circumstances in which it is committed and the feelings which impelled the author." Thus, "while the criminal act is legally the same, the means and methods used differ, depending on varying degrees of depravity and cruelty. All of these factors should guide the court in applying the penalty."[265]

75. To the extent that an international court or tribunal has jurisdiction over crimes against humanity, the penalties attached to such an offence may vary, but are expected to be appropriate given the gravity of the offence. The Statute of the International Tribunal for the Former Yugoslavia provides that "[t]he penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia" (art. 24, para. 1). Furthermore, the Tribunal is to "take into account such factors as the gravity of the offence and the individual circumstances of the convicted person" (art. 24, para. 2). The Statute of the International Tribunal for Rwanda includes identical language, except that recourse is to be had to "the general practice regarding prison sentences in the courts of Rwanda".[266] Even for convictions for the most serious international crimes of international concern, this can result in a wide range of sentences; thus, the International Tribunal for Rwanda imposed "custodial terms of forty-five, thirty-five, thirty-two, thirty, twenty-five, fifteen, twelve, ten, seven and six years in genocide prosecutions".[267] Article 77, paragraph 1(b) of the Rome Statute of the International Criminal Court also allows for flexibility of this kind, by providing for a term of imprisonment of up to 30 years or life imprisonment "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person". Similar formulations may be found in the instruments regulating the Special Court for Sierra Leone,[268] the Special Tribunal for Lebanon,[269] the Special Panels for Serious

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crimes); but see *Vasiliauskas* v. *Lithuania, Application no. 35343/05, Judgment of 20 October 2015*, European Court of Human Rights, Grand Chamber (finding unlawfully retroactive the application of a national law on genocide committed in the form of killing of a political group, since at the time of the act international treaty law had not included "political group" in the definition of genocide and customary international law was unclear). The Special Tribunal for Lebanon concluded "that individuals are *expected and required to know* that a certain conduct is criminalised in international law: at least from the time that the same conduct is criminalised also in a national legal order, a person may thus be punished by domestic courts even for conduct predating the adoption of national legislation", *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging of 16 February 2011, Case No. STL-11-01/I*, Special Tribunal for Lebanon, para. 13.

[264] Draft code of crimes against the peace and security of mankind (see footnote 134 above), art. 3, p. 22.

[265] *Ibid.*, p. 23.

[266] Statute of the International Tribunal for Rwanda (see footnote 100 above), art. 23, para. 1.

[267] Schabas, *Genocide in International Law*, pp. 464–465 (citations omitted).

[268] Statute of the Special Court for Sierra Leone (see footnote 101 above), art. 19.

[269] Statute of the Special Tribunal for Lebanon (see footnote 170 above), art. 24.

Crimes in East Timor,[270] the Extraordinary Chambers in the Courts of Cambodia,[271] the Iraqi Supreme Criminal Tribunal[272] and the Extraordinary African Chambers within the Senegalese Judicial System.[273]

76. Likewise, to the extent that a national jurisdiction has criminalized crimes against humanity, the penalties attached to such an offence may vary, but are expected to be appropriate given the gravity of the offence. France, for example, may punish crimes against humanity with life in prison "*[l]orsqu'ils sont commis en temps de guerre en exécution d'un plan concerté contre ceux qui combattent le système idéologique*"[274] (when committed in time of war pursuant to a concerted campaign against those fighting the ideological system), as well as when there is "*participation à un groupement formé ou à une entente établie en vue de la préparation, caractérisée par un ou plusieurs faits matériels, de l'un des crime définis*"[275] (participation in a group formed or association established with a view to the preparation, marked by one or more material actions, of one of the defined crimes). Other offences constituting crimes against humanity in France, however, are punished by only 10 or 15 years' imprisonment.[276] Austria also "varies [the term of imprisonment] according to the gravity of the specific crime committed. Murder committed in the course of such an attack, for example, is punishable with life imprisonment ..., rape with imprisonment of five to fifteen years".[277] The Republic of Korea does the same, providing for a minimum sentence of seven years for murder and five years for any other offence constituting a crime against humanity.[278]

77. Spain also provides for a wide range of possible prison sentences for offences constituting crimes against humanity: 15-20 years if death results; 12-15 years for rape and 4-6 years for any other type of sexual assault; 12-15 years for injuries; 8-12 years for conditions that endanger the lives or seriously impair the health of the victim; 8-12 years for expulsion; 6-8 years for forcible pregnancy; 12-15 years for forced disappearance; 8-12 years for unlawful imprisonment; 4-8 years for torture; 4-8 years for prostitution offences, including trafficking for purposes of sexual exploitation; and 4-8 years for slavery.[279] National law in Finland allows for a sentence between one year and life for the commission of a crime against humanity, with a minimum of eight years if the offender committed an "aggravated" crime against humanity.[280] Switzerland requires a minimum sentence of five years

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[270] UNTAET/REG/2000/15 (see footnote 102 above), sect. 10.

[271] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (see footnote 103 above), art. 39.

[272] Statute of the Iraqi Special Tribunal (see footnote 104 above), art. 24.

[273] Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990 (see footnote 105 above), art. 24.

[274] Written comments to the International Law Commission (2015), France, citing article 212-2 of its Criminal Code.

[275] *Ibid.*, citing article 212-3 of its Criminal Code.

[276] *Ibid.*, citing article 213-1 of its Criminal Code.

[277] *Ibid.*, Austria.

[278] *Ibid.*, the Republic of Korea, citing article 9 of its Criminal Code.

[279] *Ibid.*, Spain, citing article 607 *bis*, paragraph 2 of its Criminal Code. See also *ibid.*, Germany, and Written comments to the International Law Commission (2016), Australia, for examples of other States with various sentence ranges for different types of offences.

[280] *Ibid.*, Finland, citing chapter 11, sections 3–4 of its Criminal Code.

for a crime against humanity, with a potential sentence of life in prison "*[s]i l'acte est particulièrement grave*"[281] (if the offense is particularly serious).

78. A large number of States do not permit the death penalty for any crime, including crimes against humanity (nor do international criminal tribunals since Nuremberg), and many other States that have not abolished it do not apply it in practice. Indeed, many States view application of the death penalty as contrary to human rights law. Even so, a substantial minority of States permit the death penalty, including Bangladesh, Belarus, Botswana, China, Egypt, Ethiopia, India, Indonesia, Iraq, Japan, Jordan, Kuwait, Lebanon, Libya, Malaysia, Nigeria, Oman, Singapore, Thailand, Uganda, Viet Nam, the United Arab Emirates and the United States of America, viewing it as permissible under international law.[282] To date, treaties addressing criminalization of offences in national law have not precluded application of the death penalty, apparently recognizing that the practice of States currently varies in this regard.

79. Indeed, international treaties addressing crimes do not dictate to States parties the penalties to be imposed (or not to be imposed) but, rather, leave to States parties the discretion to determine the punishment, based on the circumstances of the particular offender and offence.[283] The Convention on the Prevention and Punishment of the Crime of Genocide simply calls for "effective penalties for persons guilty of genocide or any of the other acts enumerated" (art. V). In national practice, the flexible nature of this obligation has led to penalties prescribed for genocide ranging from periods of imprisonment, to life imprisonment, or to the death penalty. There is a variation in the penalties for the five different acts of genocide in Article II(*a*)-(*e*) of the Convention (with killing generally attracting the highest penalties), and variation in the different forms of criminal participation (with attempt, conspiracy and direct and public incitement to genocide sometimes attracting lesser penalties, the latter particularly due to concerns about the impact on freedom of expression).[284] According to one writer:

> Most domestic legal systems treat accomplices [to genocide] as harshly as principal offenders, depending on the specific circumstances. Thus, an aider and abettor could be subject to the most severe sanctions. In many judicial systems, attempted crimes are subject to substantially reduced penalties, and the same principle ought to apply with respect to genocide. The offence of direct and public incitement has been treated in domestic legislation as being significantly less serious than the other forms of participation in genocide.[285]

80. The Geneva Conventions for the protection of war victims also provide a general standard but leave to individual States the discretion to set the appropriate punishment, by simply requiring "[t]he High Contracting Parties [to] undertake to

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[281] *Ibid.*, Switzerland, citing article 264(*a*) of its Criminal Code.

[282] For an overview, see Hood and Hoyle.

[283] See, for example, Commission on Human Rights, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), para. 58 (indicating that "[s]everal delegations welcomed the room for manoeuvre granted to States" in this provision); Cassese, pp. 219–220; see also Report of the *Ad Hoc* Committee on the Drafting of an International Convention Against the Taking of Hostages, *Official Records of the General Assembly, Thirty-Second Session*, Supplement No. 39 (A/32/39), 13th meeting, pp. 68–69, para. 4 (comments of the United States of America).

[284] See, for example, *Public Prosecutor and Fifteen anonymous victims* v. *Van Anraat, Case No. 22-000509-06-2, Decision of 9 May 2007*, Court of Appeal of The Hague. See also van der Wilt, "Genocide, complicity in genocide and international v. domestic jurisdiction: reflections on the *van Anraat* case"; and Saul, p. 72.

[285] Schabas, *Genocide in International Law: the Crime of Crimes*, p. 470.

enact any legislation necessary to provide effective penal sanctions for ... any of the grave breaches of the present Convention".[286]

81. More recent treaties addressing crimes in national legal systems typically indicate that the penalty should be "appropriate." Although the Commission initially proposed the term "severe penalties" for use in its draft articles on diplomatic agents and other protected persons, the term "appropriate penalties" was instead used by States in the 1973 Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents.[287] That term has served as a model for subsequent treaties.[288] At the same time, the provision on "appropriate penalties" in the 1973 Convention was accompanied by language calling for the penalty to take into account the "grave nature" of the offence.[289] The Commission commented that such a reference was intended to emphasize that the penalty should take into account the important "world interests" at stake in punishing such an offence.[290] Since 1973, this approach — that each "State party shall make these offences punishable by the appropriate penalties which take into account their grave nature" — has been adopted for numerous treaties, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

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[286] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I), art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II), art. 50; Geneva Convention relative to the Treatment of Prisoners of War (Convention III), art. 129; and Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV), art. 146.

[287] See article 2, paragraph 2 ("Each State shall make these crimes punishable by appropriate penalties"). For an analysis of why the term "severe" was dropped, see Wood, p. 805 (finding that the Commission's proposal of "severe" penalty "had been criticised in so far as it suggested that the punishment should be greater merely because the victim was an internationally protected person").

[288] See Nowak and McArthur, p. 232. Use of the term "appropriate" rather than "severe" penalties was viewed as preferable during the course of drafting the International Convention against the taking of hostages essentially because there often was no agreement among States as to what constitutes a "severe" penalty at the national level. See the Report of the *Ad Hoc* Committee on the Drafting of an International Convention Against the Taking of Hostages (footnote 283 above), 14th meeting, pp. 77–78, para. 25 (Mexico); *ibid.*, p. 80, para. 39 (the Netherlands); and 15th meeting, p. 85, para. 12 (Denmark). Several States during the negotiations indicated a preference for the "appropriate penalties" language because they thought it better reflected a "guarantee of legal fairness"; they worried that more assertive language might lead to an infringement of human rights in national legal systems. *Ibid.*, 13th meeting, p. 72, para. 17 (Iran); *ibid.*, 14th meeting, p. 75, para. 7 (Chile); *ibid.*, pp. 77–78, para. 25 (Mexico); and *ibid.*, 15th meeting, p. 83, para. 3 (Nicaragua). Ultimately, the Convention provided for "appropriate penalties which take into account the grave nature of those offences". See International Convention against the taking of hostages, article 2.

[289] See the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, article 2, paragraph 2 ("make these crimes punishable by appropriate penalties which take into account their grave nature"). See also the Report of the *Ad Hoc* Committee on the Drafting of an International Convention Against the Taking of Hostages (footnote 283 above) pp. 74–75, para. 6.

[290] *Yearbook ... 1972*, vol. II, p. 316, para. (12) of the commentary to article 2.

Punishment.[291] In some treaties, the issue of gravity is expressed using terms such as "extreme seriousness", "serious nature" or "extreme gravity" of the offences.[292]

82. Reflecting on such language, one writer has suggested that:

> There is a certain element of intended obscurity in this language ..., reflecting the fact that systems of punishment vary from State to State and that, therefore, it would be difficult and undesirable (from the point of view of many States) for the Convention to set down any specific penalties, or range of penalties, for the offences. It could certainly be argued that a convention dealing with a crime of international concern, under which an offender may be prosecuted by a State simply on the basis of custody, should set forth a uniform range of penalties, both for the sake of consistency and to ensure that some punishment is ultimately imposed. However, it seems unlikely that States are ready to accept any such an obligation.[293]

83. Even so, language calling for the penalty to reflect the gravity of the offence serves to emphasize "that the penalties established should be akin to those normally established by Parties for serious, rather than minor, crimes", while still deferring to States' national systems.[294]

H. Draft article 5. Criminalization under national law

84. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

Draft article 5. Criminalization under national law

1. Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law: committing a crime against humanity; attempting to commit such a crime; and ordering, soliciting, inducing, aiding, abetting, or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

2. Each State also shall take the necessary measures to ensure that the following are offences under its criminal law:

(*a*) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes against humanity committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

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[291] Art. 4. See also the Convention on the Safety of United Nations and Associated Personnel, art. 9, para. 2 ("appropriate penalties which shall take into account their grave nature"); the International Convention for the Suppression of Terrorist Bombings, art. 4, para. (b) ("appropriate penalties which take into account the grave nature of those offences"); the International Convention for the Suppression of the Financing of Terrorism, art. 4, para. (b) ("appropriate penalties which take into account the grave nature of the offences"); and the OAU Convention on the Prevention and Combating of Terrorism, 1999, art. 2(a) ("appropriate penalties that take into account the grave nature of such offences").

[292] See, for example, the International Convention for the Protection of All Persons from Enforced Disappearance, art. 7, para. 1 ("appropriate penalties which take into account its extreme seriousness"); the Inter-American Convention to Prevent and Punish Torture, art. 6 ("severe penalties that take into account their serious nature"); and the Inter-American Convention on the Forced Disappearance of Persons, art. III ("appropriate punishment commensurate with its extreme gravity").

[293] Lambert, p. 102.

[294] See Ingelse, p. 320; Lambert, p. 103; and Nowak and McArthur, p. 249.

(i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution;

(*b*) With respect to superior and subordinate relationships not described in paragraph (*a*), a superior shall be criminally responsible for crimes against humanity committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) the crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

3. Each State also shall take the necessary measures to ensure that:

(*a*) the fact that an offence referred to in this draft article was committed pursuant to an order of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate;

(*b*) an offence referred to in this draft article shall not be subject to any statute of limitations; and

(*c*) an offence referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.

CHAPTER II

Establishment of national jurisdiction

85. Whenever a State adopts a national law that criminalizes an offence, the State must also determine the extent of its national jurisdiction[295] when such offences occur. Thus, a State may establish jurisdiction only when the offence occurs within its territory, or only when one of its nationals commits the offence, or on some other basis, whether singly or in combination. For example, with respect to crimes against humanity, the first report noted that a study of the national laws of 83 States

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[295] As a general matter, "jurisdiction" in the context of national law describes the parameters within which a State makes (or "prescribes"), applies, and enforces rules of conduct as they pertain to individuals, and it may come in many forms; see Staker. Even if international law permits the exercise of a certain form of national jurisdiction, any given State may not have enacted national laws that allow for the exercise of such jurisdiction to its fullest extent; see, generally, Naqvi.

revealed that only 21 of them had established jurisdiction over a non-national who allegedly committed the offence abroad against non-nationals.[296]

86. As a general matter, international instruments have sought to encourage States to establish a relatively wide range of jurisdictional bases under national law to address the most serious crimes of international concern, so that there is no safe haven for those who commit the offence. Thus, according to the Commission's 1996 draft code of crimes against the peace and security of mankind, "each State party shall take such measures as may be necessary to establish its jurisdiction over the crimes" laid out in the draft code, other than the crime of aggression, "irrespective of where or by whom those crimes were committed".[297] The breadth of such jurisdiction was necessary because the "Commission considered that the effective implementation of the Code required a combined approach to jurisdiction based on the broadest jurisdiction of national courts together with the possible jurisdiction of an international criminal court".[298] The preamble to the Rome Statute of the International Criminal Court provides "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level", and further "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".

87. As such, when treaties concerning crimes address national law implementation, they typically include a provision on the establishment of national jurisdiction. For example, discussions within a working group of the Human Rights Council convened to draft an international instrument on enforced disappearance concluded that: "The establishment of the broadest possible jurisdiction for domestic criminal courts in respect of enforced disappearance appeared to be essential if the future instrument was to be effective."[299] At the same time, while for most treaties addressing international crimes "[i]t is mandatory for States to 'establish' jurisdiction over the specified offences ... that does not carry with it an obligation to exercise that jurisdiction in any particular case".[300] Rather, such treaties typically only obligate a State party to *exercise* its jurisdiction when an alleged offender is present in the State party's territory (see chapter IV of this report), leading either to a submission of the matter to prosecution within that State party or to extradition or surrender of the alleged offender to another State party or competent international tribunal (see chapter V of this report).

88. The following analysis explains the types of national jurisdiction that usually must be established under treaties addressing crimes.

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[296] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/680, para. 61. See also Mitchell, paras. 34–35 (finding that "only 52 per cent of the 94 States for whom their jurisdictional position is known have sufficient national legislation to allow for the prosecution of a non-national who is alleged to have committed crimes against humanity outside the State").

[297] Draft code of crimes against the peace and security of mankind (see footnote 134 above), art. 8, p. 27.

[298] *Ibid.*, p. 28, para. (5).

[299] Commission on Human Rights, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2003/71), para. 65.

[300] McClean, p. 167.

A. Types of national jurisdiction over offences

89. As indicated above, a key objective of treaties that address criminal acts is to obligate States to establish national jurisdiction in a manner that makes it difficult for an alleged offender to seek refuge anywhere else in the world. For example, article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment obligates each State party to establish several types of national jurisdiction with respect to the crime of torture. The article provides:

> 1. Each State party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to [in this Convention] in the following cases:
>
> (*a*) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
>
> (*b*) When the alleged offender is a national of that State;
>
> (*c*) When the victim is a national of that State if that State considers it appropriate.
>
> 2. Each State party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8[301] to any of the States mentioned in paragraph 1 of this article.
>
> 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

90. Thus, article 5, paragraph 1(*a*), requires that jurisdiction be established when the offence occurs in the State's territory, a type of jurisdiction often referred to as "territorial jurisdiction." Article 5, paragraph 1(*b*), calls for jurisdiction when the alleged offender is a national of the State, a type of jurisdiction at times referred to as "nationality jurisdiction" or "active personality jurisdiction." Article 5, paragraph 1(*c*), calls for jurisdiction when the victim of the offence is a national of the State, a type of jurisdiction at times referred to as "passive personality jurisdiction." Notably, this last type of jurisdiction in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is optional: a State may establish such jurisdiction "if that State considers it appropriate", but the State is not obliged to do so.

91. Article 5, paragraph 2, addresses a situation where the other types of jurisdiction may not exist, but the alleged offender "is present" in territory under the State's jurisdiction. In such a situation, even if the crime was not committed on its territory, the alleged offender is not its national and the victim(s) of the crime is not its national, the State nevertheless is obligated to establish jurisdiction given the presence of the alleged offender in its territory. This obligation helps prevent an alleged offender from seeking refuge in a State with which the offence otherwise has no connection. In situations where the alleged offender is not present, however, this article does not impose an obligation on the State to establish jurisdiction over the offence.

92. Provisions comparable to article 5 exist in many recent treaties addressing crimes, including the International Convention for the Protection of All Persons from Enforced Disappearance (art. 9). While no convention yet exists relating to crimes against humanity, Judges Higgins, Kooijmans and Buergenthal indicated in their separate opinion in the *Arrest Warrant* case that:

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[301] Article 8 addresses issues relating to extradition.

> The series of multilateral treaties with their special jurisdictional provisions reflect a determination by the international community that those engaged in war crimes, hijacking, hostage taking [and] torture should not go unpunished. Although crimes against humanity are not yet the object of a distinct convention, a comparable international indignation at such acts is not to be doubted.[302]

93. Establishment of these types of national jurisdiction are also important in supporting the separate provision in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which sets forth an *aut dedere aut judicare* obligation.[303] In his separate opinion in the *Arrest Warrant* case, Judge Guillaume remarked on the "system" set up under treaties of this sort:

> Whenever a perpetrator of any of the offences covered by these conventions is found in the territory of a State, that State is under an obligation to arrest him, and then extradite or prosecute. *It must have first conferred jurisdiction on its courts to try him if he is not extradited.** Thus, universal punishment of all the offences in question is assured, as the perpetrators are denied refuge in all States.[304]

94. Each of these types of jurisdiction is discussed briefly below.

1. WHEN THE OFFENCE OCCURS IN THE STATE'S TERRITORY

95. National criminal jurisdiction principally focuses on crimes committed within the territory of the State. Indeed, under the national law of many States, criminal law is often presumed to apply only to conduct occurring within the territory of the State and not to conduct that occurs extraterritorially unless the national law indicates otherwise.[305] International law historically has recognized the permissibly of the State establishing and exercising such "territorial jurisdiction", viewing it as an inherent aspect of State sovereignty.[306]

96. States that have adopted national laws on crimes against humanity invariably establish jurisdiction over such offences when they occur within the State's territory, as may be seen in the written comments provided to the Commission in relation to this topic.[307] Thus, Belgium punishes "*[l]'infraction commise sur le territoire du royaume, par des Belges ou par des étrangers*"[308] (the offense committed in the territory of the kingdom, by Belgians or by foreigners). The Netherlands "is capable of exercising jurisdiction over an alleged offender for the commission of a crime against humanity in case: the crime against humanity has been committed *in* the Netherlands (territoriality principle — Article 2 of the Criminal Code); the crime against humanity has been committed on *board* a vessel or an aircraft registered in the Netherlands (flag principle — Article 3 of the

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[302] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, p. 78, para. 51.

[303] Crawford, pp. 469–471; and McClean, p. 170.

[304] *Arrest Warrant of 11 April 2000* (see footnote 302 above), Separate Opinion of President Guillaume, p. 39, para. 9.

[305] Bantekas, *International Criminal Law*, p. 332; see also Clapham, *Brierly's Law of Nations*, p. 242; Lambert, p. 144; Nowak and McArthur, pp. 264 and 308; Staker, p. 316; and Thalmann, p. 237 (citing the *Case of the S.S. "Lotus"*).

[306] See, generally, Clapham, *Brierly's Law of Nations*, p. 242; Crawford, pp. 458–459; Lambert, p. 147; Shaw, pp. 474–475; and Dupuy and Kerbrat, p. 602.

[307] In addition to those discussed here, see Written comments to the International Law Commission (2015), Finland; *ibid.*, Germany; Criminal Code of Switzerland of 21 December 1937, art. 3, available from www.legislationline.org/documents/section/criminal-codes; and Written comments to the International Law Commission (2015), the United Kingdom.

[308] *Ibid.*, Belgium, citing article 3 of its Criminal Code.

Criminal Code)".[309] The French Penal Code "'*est applicable aux infractions commises sur le territoire de la République. L'infraction est réputée commise sur le territoire de la République dès lors qu'un de ses faits constitutifs a eu lieu sur ce territoire', et dans d'autres cas particuliers concernant les infractions commises à bord des navires battant un pavillon français*"[310] ('is applicable to offenses committed on the territory of the Republic. The offense is considered to be committed in the territory of the Republic where one of its constituent facts took place in this territory', and other special cases concerning offenses committed on board vessels flying a French flag). In Spain, "courts shall have jurisdiction to hear cases involving offences or misdemeanours committed in Spanish territory or on board Spanish ships or aircraft".[311] The Republic of Korea similarly applies its laws on crimes against humanity "to any Korean national or foreigner who commits a crime provided for in this Act within the territory of the Republic of Korea" and "to any foreigner who commits a crime provided for in this Act on board a vessel or aircraft registered in the Republic of Korea, while outside the territory of the Republic of Korea".[312]

97. As noted in some of these examples, territorial jurisdiction often encompasses jurisdiction over crimes committed on board a vessel or aircraft registered to the State;[313] indeed, States that have adopted national laws on crimes against humanity typically establish jurisdiction over acts occurring on such a vessel or aircraft.[314]

98. Many States that have adopted a statute on crimes against humanity do not expressly address the issue of jurisdiction within that statute. Rather, the national criminal law system is structured so that, once a criminal offence is defined within the national law, territorial jurisdiction automatically exists with respect to that crime. Thus, the Criminal Code of Bulgaria applies "to all crimes committed on the territory of the Republic of Bulgaria".[315] The same is true of, among others, Cuba,[316] Germany,[317] Hungary,[318] Mexico,[319] the Russian Federation[320] and Turkey.[321]

99. Treaties addressing crimes typically obligate States parties to establish territorial jurisdiction over the offence, as was indicated above with respect to article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

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[309] *Ibid.*, the Netherlands.

[310] *Ibid.*, France.

[311] *Ibid.*, Spain, Annex II, art. 23.

[312] *Ibid.*, the Republic of Korea, citing article 3 of its Criminal Code.

[313] Bantekas, *International Criminal Law*, p. 337; and Cassese *et al.*, p. 275.

[314] See, for example, Written comments to the International Law Commission (2015), France; *ibid.*, the Netherlands; *ibid.*, the Republic of Korea, citing article 3, paragraphs (1) and (3) of its Criminal Code; and *ibid.*, Spain, Annex II, art. 23.

[315] Criminal Code of Bulgaria (see footnote 63 above), art. 3.

[316] Criminal Code of Cuba (see footnote 65 above), art. 4, para. 1.

[317] Criminal Code of Germany of 13 November 1998, sect. 3, available from germanlawarchive.iuscomp.org/?p=752.

[318] Criminal Code of the Republic of Hungary (see footnote 70 above), sect. 3, para. (1)a).

[319] Federal Criminal Code of Mexico (see footnote 74 above), arts. 1 and 5.

[320] Criminal Code of the Russian Federation (see footnote 77 above), art. 11.

[321] Criminal Code of Turkey, Law No. 5237 of 26 September 2004, art. 8 para. (2), available from www.legislationline.org/documents/section/criminal-codes.

Punishment.[322] Similar provisions may be found in the Convention on the suppression of unlawful seizure of aircraft (art. 4); the Convention for the suppression of unlawful acts against the safety of civil aviation (art. 5, para. 1(*a*)-(*b*)); the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (art. 3); the International Convention against the taking of hostages (art. 5, para. 1(*a*)); the 1985 Inter-American Torture Convention (art. 12(a)); the Convention on the Safety of United Nations and Associated Personnel (art. 10, para. 1(a)); the Inter-American Convention on the Forced Disappearance of Persons (art. IV); the International Convention for the Suppression of Terrorist Bombings (art. 6, para. 1(a)-(b)); the International Convention for the Suppression of the Financing of Terrorism (art. 7, para. 1(a)-(b)); the OAU Convention on the Prevention and Combating of Terrorism, 1999 (art. 6, para. 1(a)-(b)), the United Nations Convention against Transnational Organized Crime (art. 15, para. 1(a)-(b)); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 9, para. 1(a)); and the ASEAN Convention on Counter Terrorism (art. VII, para. 1(a)-(b)).

100. In drafting what would become the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, the Commission explicitly noted "the generally acknowledged primacy of the principle of territoriality in matters of jurisdiction".[323] As writers have indicated, the territorial basis for jurisdiction is non-controversial and generally goes unchallenged during the drafting of these treaties.[324]

2. WHEN THE OFFENCE IS COMMITTED BY THE STATE'S NATIONAL

101. National law may also allow for the establishment of jurisdiction over crimes committed outside the State's territory by a national of that State, a type of jurisdiction often referred to as "nationality jurisdiction" or "active personality jurisdiction".[325] As has been noted, "[t]he competence of a State to prosecute its nationals on the sole basis of their nationality — and regardless of the territorial State's competing claim — is based on the allegiance that is owed to one's country of nationality under domestic law".[326]

102. Of those States that responded to the Commission's request for information about their national laws on crimes against humanity, most indicated that they

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[322] Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide provides that States parties must exercise jurisdiction when the crime is committed within their territory ("Persons charged with genocide or any of the other acts enumerated in [this Convention] shall be tried by a competent tribunal of the State in the territory of which the act was committed"). To that end, States parties either implement the treaty obligation directly in their national law or through an implementing statute. For example, the United States provides for jurisdiction over the offences of genocide, as well as incitement, attempt and conspiracy to commit genocide, if "the offense is committed in whole or in part within the United States" (United States Code, Title 18, sect. 1091(e)).

[323] *Yearbook ... 1972*, vol. II, p. 320, para. (6) of the commentary to article 8 of the draft articles on the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law.

[324] See Clapham, *Brierly's Law of Nations*, p. 242; Lambert, p. 144; Nowak and McArthur, pp. 264 and 308; Shaw, p. 477; and Thalmann, p. 237.

[325] See Clapham, *Brierly's Law of Nations*, p. 242; Crawford p. 459; Dupuy and Kerbrat, p. 602; and Shaw, p. 479.

[326] Bantekas, *International Criminal Law*, p. 338. See also Lambert, p. 147; Crawford, pp. 459 and 461; Shaw, pp. 279 and 482; and Staker, pp. 318–319.

provide for such jurisdiction.[327] For example, Belgium has established jurisdiction over "*tout Belge ou toute personne ayant sa résidence principale sur le territoire du royaume qui, hors du territoire du royaume, se sera rendu coupable*"[328] (any Belgian or any person whose main residence is in the territory of the kingdom who, outside the territory of the kingdom, is guilty). The Netherlands "is capable of exercising jurisdiction over an alleged offender for the commission of a crime against humanity in case ... the crime against humanity has been committed outside the Netherlands *by* a Dutch national (including the situation that the alleged offender has become a Dutch national only after committing the crime) (active nationality principle — Article 2 of the International Crimes Act); the crime against humanity has been committed outside the Netherlands *by* a Dutch resident, under the condition of double criminality (active personality principle — Article 7(1) [and] (3) of the Criminal Code)".[329] French law similarly has established "*la compétence pénale active des juridictions françaises, lorsque* l'auteur est français *(Article L 113-6 du Code pénal: 'la loi pénale française est applicable à tout crime commis par un Français hors du territoire de la République')*"[330] (active criminal jurisdiction of the French courts, where *the author is French* (Article L 1136 of the Criminal Code: 'French criminal law is applicable to any crime committed by a French national outside the territory of the Republic'). The Republic of Korea can apply its legal provisions on crimes against humanity "to any Korean national who commits a crime provided for in this Act outside the territory of the Republic of Korea".[331]

103. Neither the Convention on the Prevention and Punishment of the Crime of Genocide nor the Geneva Conventions for the protection of war victims obligate States parties to establish nationality jurisdiction, although the *travaux préparatoires* of the former suggests a belief that States would exercise nationality jurisdiction over alleged offenders.[332] Even so, nationality jurisdiction is a feature of virtually all contemporary treaties addressing crimes, including the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (art. 3); the International Convention against the taking of hostages (art. 5, para. 1(*b*)); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 5, para. 1(*b*)); the Inter-American Convention to Prevent and Punish Torture (art. 12(b)); the Convention on the Safety of United Nations and Associated Personnel (art. 10, para. 1(b)); the Inter-American Convention on the Forced Disappearance of Persons (art. IV, para. (b)); the International Convention for the Suppression of Terrorist Bombings (art. 6, para. 1(c)); the International Convention for the Suppression of the Financing of Terrorism (art. 7, para. 1(c)); the OAU Convention on the Prevention and Combating of Terrorism, 1999 (art. 6, para. 1(c); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 9, para. 1(b)); and the ASEAN

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[327] In addition to those discussed here, see Written comments to the International Law Commission (2015), Austria; *ibid.*, Cuba, citing article 5, paragraph 2 of its Criminal Code; *ibid.*, Finland; *ibid.*, Germany, citing section 153f, paragraph (2)1 of its Criminal Code; *ibid.*, Spain, Annex II, art. 23; and *ibid.*, the United Kingdom.

[328] *Ibid.*, Belgium, citing article 6, paragraph 1 of the Preliminary Title of its Criminal Procedure Code.

[329] *Ibid.*, the Netherlands.

[330] *Ibid.*, France (emphasis in original).

[331] *Ibid.*, the Republic of Korea, citing article 3, paragraph 2 of its Criminal Code.

[332] See the Conclusion of the consideration of the draft convention on genocide [E/794]: report of the Economic and Social Council [A/633], 2 December 1948 (A/C.6/SR.134), pp. 715–718.

Convention on Counter Terrorism (art. VII, para. 1(c)). The Convention on the suppression of unlawful seizure of aircraft, however, does not contain such language.

104. Such conventions do not impose an obligation to establish jurisdiction with respect to persons who are not nationals but are legal residents of a State party. As such, it is left to the States parties whether, in their national law, to establish jurisdiction as well with respect to residents.[333] As noted below, however, under such conventions a State party typically is obligated to establish jurisdiction with respect to any alleged offenders who are present in its territory, which includes either residents or stateless persons.

3. WHEN THE OFFENCE IS COMMITTED AGAINST THE STATE'S NATIONAL

105. National law may also establish jurisdiction over crimes committed outside the State's territory when the victim of the crime is a national of that State, a type of jurisdiction sometimes referred to as "passive personality" or "passive nationality" jurisdiction.[334] The establishment of this type of jurisdiction by States is less common than the establishment of territorial and nationality jurisdiction; some States have established this type of jurisdiction at least for some types of crimes, while others do not, and still others vigorously oppose it. Those in favour argue that such jurisdiction can help fill a jurisdictional gap and that States have a strong interest in protecting their nationals at least against certain types of serious crimes, such as the taking of hostages.[335] Those States opposing such jurisdiction have expressed concerns about promoting such jurisdiction, which might be abused or at least give rise to unnecessary, conflicting jurisdictional claims.[336]

106. Of those States that responded to the Commission's request for information about their national laws on crimes against humanity, many indicated that they provide for such jurisdiction.[337] For example, Belgium has established jurisdiction over a grave violation of international humanitarian law "*commise contre une personne qui, au moment des faits, est un ressortissant belge ou un réfugié reconnu en Belgique et y ayant sa résidence habituelle ... ou une personne qui, depuis au moins trois ans, séjourne effectivement, habituellement et légalement en Belgique*"[338] (committed against a person who, at the time, is a Belgian citizen or a recognized refugee in Belgium with habitual residence in Belgium ... or a person who, for at least three years has been effectively, habitually and legally staying in Belgium). Similarly, "the Netherlands is capable of exercising jurisdiction over an alleged offender for the commission of a crime against humanity in case ... the crime against humanity has been committed outside the Netherlands *against* a Dutch

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[333] See, for example, Ireland-Piper, p. 74.

[334] Crawford, p. 461; and Shaw, p. 482.

[335] Report of the *Ad Hoc* Committee on the Drafting of an International Convention Against the Taking of Hostages, *Official Records of the General Assembly, Thirty-Third Session*, Supplement No. 39 (A/33/39),, 23rd meeting, p. 41, para. 15 (France); p. 44, para. 32 (Algeria); and p. 45, para. 33 (Nigeria).

[336] *Ibid.*, p. 39, para. 6 (the Netherlands); p. 40, para. 11 (the United Kingdom); p. 42, para. 20 (Germany); p. 43, para. 24 (United States of America); and p. 44, para. 29 (Union of Soviet Socialist Republics).

[337] In addition to those discussed here, see Written comments to the International Law Commission (2015), Austria; *ibid.*, Finland; *ibid.*, Germany, citing section 153f, paragraph (2)2of its Criminal Code; *ibid.*, Spain, citing article 23, paragraph 4(a) of its Criminal Code; and *ibid.*, Switzerland, citing, article 264m of its Criminal Code.

[338] *Ibid.*, Belgium, citing article 10, paragraphs 1and 1 *bis* of the Preliminary Title of its Criminal Procedure Code.

national (passive nationality principle — Article 2 of the International Crimes Act); the crime against humanity has been committed outside the Netherlands *against* a Dutch resident, under the condition of double criminality".[339] French law allows for the exercise "*de la compétence pénale passive lorsque* la victime est française au moment de l'infraction *(Article L 113-7 du Code pénal: 'La loi pénale française est applicable à tout crime, ainsi qu'à tout délit puni d'emprisonnement, commis par un Français ou par un étranger hors du territoire de la République lorsque la victime est de nationalité française au moment de l'infraction')*"[340] (of passive criminal jurisdiction when *the victim is French at the time of the offense* (Article L 1137 of the Criminal Code: 'French criminal law is applicable to any crime, as well as any offense punishable by imprisonment, committed by a French person or a foreigner outside the territory of the Republic when the victim is of French nationality at the time of the offense') Finally, the Republic of Korea has established jurisdiction over "any foreigner who commits a crime provided for in this Act against the Republic of Korea or its people outside the territory of the Republic of Korea".[341]

107. Given the uneven State practice with respect to this jurisdiction, its establishment is usually not compelled in treaties addressing crimes; rather, this type of jurisdiction is identified as an option that any given State party may or may not exercise.[342] Such an approach reflects a desire for establishing as much jurisdiction as possible to promote the punishment of offenders, while at the same time preserving and respecting State sovereignty and discretion when responding to harms inflicted on that State's nationals.[343]

108. Neither the Convention on the Prevention and Punishment of the Crime of Genocide nor the Geneva Conventions for the protection of war victims obligate States parties to establish "passive personality" jurisdiction, but such jurisdiction is identified as an option in many treaties addressing crimes, including the Convention on the suppression of unlawful seizure of aircraft (art. 4, para. 1(a)), as amended by the protocol supplementary to the Convention for the suppression of unlawful seizure of aircraft;[344] the International Convention against the taking of hostages (art. 5, para. 1(*d*)); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 5, para. 1(*c*)); the Inter-American Convention to Prevent and Punish Torture (art. 12(c)); the Convention on the Safety of United Nations and Associated Personnel (art. 10, para. 2(b)); the Inter-American Convention on the Forced Disappearance of Persons (art. IV, para. (c)); the International Convention for the Suppression of Terrorist Bombings (art. 6, para. 2(a)); the International Convention for the Suppression of the Financing of Terrorism (art. 7, para. 2(a)); the OAU Convention on the Prevention and Combating of Terrorism, 1999 (art. 6, para. (2)(a)); the United Nations Convention against Transnational Organized Crime (art. 15, para. 2(a)); the International Convention for

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[339] *Ibid.*, the Netherlands.

[340] *Ibid.*, France (emphasis in original).

[341] *Ibid.*, the Republic of Korea, citing article 3, paragraph (4) of its Criminal Code.

[342] *Arrest Warrant of 11 April 2000* (see footnote 302 above), Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, pp. 76–77, para. 47 ("Passive personality jurisdiction, for so long regarded as controversial, is now reflected ... in the legislation of various countries ..., and today meets with relatively little opposition, at least so far as a particular category of offences is concerned").

[343] See Lambert, pp. 152–154; and Nowak and McArthur, pp. 310–312.

[344] As of 2015, 14 States were party to the protocol, which will enter into force once there are 22 States parties.

the Protection of All Persons from Enforced Disappearance (art. 9, para. 1(c)); and the ASEAN Convention on Counter Terrorism (art. VII, para. 2(a)).

4. WHEN THE ALLEGED OFFENDER IS PRESENT IN THE STATE'S TERRITORY

109. National law may also establish jurisdiction over crimes committed outside the State's territory based solely on the presence of the alleged offender within that territory. As noted above, such jurisdiction is irrespective of nationality, and therefore includes persons who are non-nationals (whether or not resident in the State) as well as stateless persons. With respect to crimes against humanity, the ninth edition of *Oppenheim's International Law* (published in 1992) found that:

> While no general rule of positive international law can as yet be asserted which gives to states the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications pointing to the gradual evolution of a significant principle of international law to that effect.[345]

110. Of those States that responded to the Commission's request for information about their national laws on crimes against humanity, many indicated that they provide for such jurisdiction within their national law.[346] Austria, for example, has jurisdiction over "a foreigner who has his habitual residence on the territory of Austria or is present in Austria and cannot be extradited".[347] Finnish law also "applies to an offence committed outside of Finland where the punishability of the act, regardless of the place of commission, is based on an international agreement binding on Finland or on another statute or regulation internationally binding on Finland (international offence). Crimes against humanity, war crimes and genocide are included in such offences."[348] French law "*est également applicable à tout crime ou à tout délit puni d'au moins cinq ans d'emprisonnement commis hors du territoire de la République par un étranger dont l'extradition ou la remise a été refusée à l'État requérant par les autorités françaises*"[349] (is also applicable to any felony or any offense punishable by at least five years' imprisonment committed outside the territory of the Republic by a foreigner whose extradition or surrender has been denied to the requesting State by the French authorities). Finally, the Republic of Korea also applies jurisdiction "to any foreigner who commits the crime of genocide, etc. outside the territory of the Republic of Korea and resides in the territory of the Republic of Korea".[350] Other States allow for such jurisdiction as well in the context of crimes against humanity, often under the influence of their adherence to the Rome Statute of the International Criminal Court, such as Kenya, Mauritius, South Africa and Uganda.[351] In 2012, the African Union adopted a model

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[345] Jennings and Watts, p. 998.

[346] In addition to those discussed here, see Written comments to the International Law Commission (2015), Cuba, citing article 5, paragraph 3 of its Criminal Code; *ibid.*, the Czech Republic; *ibid.*, Germany, citing section 153f, paragraph 2 of its Criminal Code; *ibid.*, Spain; *ibid.*, Switzerland; and *ibid.*, the United Kingdom.

[347] *Ibid.*, Austria.

[348] *Ibid.*, Finland.

[349] *Ibid.*, France.

[350] *Ibid.*, Republic of Korea, citing article 3, paragraph (5), of its Criminal Code.

[351] See the Kenya International Criminal Courts Act, 2008, section 18(*c*) (2008) (providing that "[a] person who is alleged to have committed an offence under any of sections 9 to 17 of the Act may be tried and punished in Kenya for that offence if … the person is, after commission of the offence, present in Kenya"); the Mauritius International Criminal Court Act 2011, Act No. 27 of 2011, section 4, paragraph (3)(c) (providing that "[w]here a person commits an international crime outside Mauritius, he shall be deemed to have committed the crime in Mauritius if he—... (c) is present in Mauritius after the commission of the crime"); the South Africa Implementation of the

law for use by African States that, *inter alia*, provides for jurisdiction to prosecute for crimes against humanity based solely on the presence of the alleged offender "within the territory of the State".[352]

111. Favouring the establishment of such jurisdiction, even in the absence of a treaty, is the argument that doing so furthers the interests of the international community in deterring and punishing international crimes.[353] Even so, often such jurisdiction appears to be established pursuant to a treaty obligation. While the Convention on the Prevention and Punishment of the Crime of Genocide did not envisage such jurisdiction, the Geneva Conventions for the protection of war victims provide that:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.[354]

The Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) incorporates this provision by reference (art. 85, para. 1). According to Pictet's *Commentary on the Geneva Conventions of 12 August 1949*, the obligation set forth in the first sentence requires States parties to search for offenders who may be on their territory,[355] not

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Rome Statute of the International Criminal Court Act 27 of 2002, section 4, paragraph (3)(*c*) (providing that "[i]n order to secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits a crime contemplated in subsection (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if ... (*c*) that person, after the commission of the crime, is present in the territory of the Republic"); and the Uganda International Criminal Court Act, 2010, section 18(*d*) (similarly allowing proceedings against a person for crimes committed outside the territory of Uganda if that "person is, after the commission of the offence, present in Uganda").

[352] See African Union Model National Law on Universal Jurisdiction over International Crimes, document EX.CL/731(XXI)c, articles 4*a*) and 8, adopted by the African Union Executive Council at its Twenty-First Ordinary Session, in Addis Ababa, (9–13 July 2012). Article 4*a*) states in full: "The Court shall have jurisdiction to try any person alleged to have committed any crime under this law, regardless of whether such a crime is alleged to have been committed in the territory of the State or abroad and irrespective of the nationality of the victim, provided that such a person shall be within the territory of the State."

[353] See *Prosecutor* v. *Anto Furundžija* (footnote 128 above), paragraph 156: "it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. ... It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes." See also *Prosecutor* v. *Duško Tadić, Case No. IT-94-1, Decision on the Defence Motion on Jurisdiction of 10 August 1995*, International Tribunal for the Former Yugoslavia, Trial Chamber, para. 42 (noting that the crimes within the jurisdiction of the International Tribunal for the Former Yugoslavia "are not crimes of a purely domestic nature" but "are really crimes which are universal in nature, well recognized in international law as serious breaches of international humanitarian law, and transcending the interest of any one State"); and Ingelse, pp. 320–321.

[354] See the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50; the Geneva Convention Convention relative to the Treatment of Prisoners of War, art. 129; and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 146. See also ICRC, Customary IHL Database, "Practice relating to Rule 157. Jurisdiction over war crimes", available from www.icrc.org/customary-ihl/eng/docs/v2_rul_rule157.

[355] See Pictet, pp. 365–366.

offenders worldwide. Further, as may be seen in the second sentence, this type of jurisdiction is typically linked with a statement that the State's obligation to exercise such jurisdiction may be satisfied by extraditing the person to another State party.

112. Numerous more recent conventions obligate States parties to establish such jurisdiction with respect to the crimes that they address, including the Convention on the suppression of unlawful seizure of aircraft (art. 4); the Convention for the suppression of unlawful acts against the safety of civil aviation (art. 5, para. 2); the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (art. 3, para. 2); the International Convention against the taking of hostages (art. 5, para. 2); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 5, para. 2); the Inter-American Convention to Prevent and Punish Torture (art. 12); the Convention on the Safety of United Nations and Associated Personnel (art 10, para. 4); the Inter-American Convention on the Forced Disappearance of Persons (art. IV); the International Convention for the Suppression of Terrorist Bombings (art. 6, para. 4); the International Convention for the Suppression of the Financing of Terrorism (art. 7, para. 4); the OAU Convention on the Prevention and Combating of Terrorism, 1999 (art. 6, para. 4); the United Nations Convention against Transnational Organized Crime (art. 15, para. 4); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 9, para. 2); and the ASEAN Convention on Counter Terrorism (art. VII, para. 3).

113. A well-known example of the exercise of such jurisdiction under a treaty is the *Pinochet* case, where the House of Lords of the United Kingdom found that by virtue of ratifying the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "there is an obligation on a state to extradite or prosecute where a person accused of torture is found within its territory".[356] Yet other examples of the exercise of such treaty-based jurisdiction may be found in various States and regions.[357] Sometimes such jurisdiction is referred to as "universal jurisdiction", but some question the use of that term in this particular context, given the existence of a treaty and of a requirement under the treaty for the presence of the alleged offender in the territory of the State party.[358]

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[356] *Regina* v. *Bartle and the Commissioner of Police for the Metropolis and Others (Appellants)* ex parte *Pinochet (Respondent) (on appeal from a Divisional Court of the Queen's Bench Division) and Regina* v. *Evans and Another and the Commissioner of the Police for the Metropolis and Others (Appellants)* ex parte Pinochet *(Respondent) (on appeal from a Divisional Court of the Queen's Bench Division), Opinion of the Lords of Appeal for Judgment in the Case,* Opinion of Lord Llod of Berwick, p. 28. For views of the Committee against Torture, see Conclusions and recommendations of the Committee against Torture, Yugoslavia (CAT/C/SR.354), para. 39 (asserting that "article 5, paragraph 2 ... required States parties to take such measures as were necessary to establish jurisdiction over the offences referred to in article 4 in cases where the alleged offender was present in any territory under its jurisdiction and it had decided not to extradite him to another State"); and Conclusions and recommendations of the Committee against Torture, France (CAT/C/FRA/CO/3 and Add.1), para. 13 (asserting "that the State party should remain committed to prosecuting and trying alleged perpetrators of acts of torture who are present in any territory under its jurisdiction, regardless of their nationality").

[357] See for example, Council of the European Union, The AU-EU Expert Report on the Principle of Universal Jurisdiction, document 8672/1/09 REV 1 of 16 April 2009, available from www.africa-eu-partnership.org/en/documents/au-eu-expert-report-principle-universal-jurisdiction. See also Macedo; and Reydams.

[358] Thus, in their joint separate opinion in the *Arrest Warrant* case, Judges Higgins, Kooijmans and Buergenthal referred to the "inaccurately termed 'universal jurisdiction' principle in these

114. At the same time, treaties such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment do not obligate States parties to establish jurisdiction over the alleged offender if he or she is not present in the State's territory. Consequently, national courts are often careful to limit their jurisdiction when implementing such treaties to situations where the alleged offender is present. For example, in the *Bouterse* case, the Supreme Court of the Netherlands made clear that the exercise of jurisdiction (pursuant to the Netherlands Torture Convention Implementation Act) over a person alleged to have committed the crime of torture must be based upon either a Dutch nationality associated with the proceedings or on the presence of the alleged offender within the Netherlands at the time the prosecution is initiated.[359] As such, the Court rejected exercising jurisdiction over a defendant *in absentia* because there was no direct link with the Dutch legal order, the defendant (Bouterse) was in Suriname and none of the alleged victims were Dutch nationals.[360] Reflecting on such practice, President Guillaume, in his separate opinion in the *Arrest Warrant* case, concluded that none of the relevant treaties "has contemplated establishing jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question".[361]

115. Further, such treaties normally do not seek to resolve the question of whether any particular State party should have primacy in the event that multiple States have national jurisdiction over the criminal offence and wish to exercise such jurisdiction.[362] While some bilateral and regional agreements have sought to address the matter, the issue is complicated in part due to the existence of grounds for refusing to extradite, including with respect to obligations of *non-refoulement*.[363] Rather, such matters often are often resolved though comity and cooperation among the States parties, taking into account the location of the evidence, witnesses, victims and other relevant matters.[364] As a practical matter, the State party in whose

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treaties" (*Arrest Warrant of 11 April 2000* (see footnote 302 above), Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, p. 75, para. 44). Rather, they indicated that such jurisdiction was better characterized as "an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere" (*ibid.*, pp. 74–75, para. 41).

[359] *Prosecutor-General of the Supreme Court* v. *Desiré Bouterse, Case No. LJN: AB1471, Judgment of 18 September 2001*, Supreme Court of the Netherlands, paras. 8.2–8.3.5.

[360] *Ibid.*, para. 8.5.

[361] *Arrest Warrant of 11 April 2000* (see footnote 302 above), Separate Opinion of President Guillaume, pp. 39–40, para. 9. See also *ibid.*, Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, p. 75, para. 44 (finding that "a dispassionate analysis of State practice and Court decisions suggests that no [universal jurisdiction without a territorial nexus] is presently being exercised"); and *ibid.*, p. 76, para. 45 (finding that "virtually all national legislation envisages links of some sort to the forum State" and that "no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction").

[362] See, for example, The AU-EU Expert Report on the Principle of Universal Jurisdiction (footnote 357 above), para. 14 ("Positive international law recognises no hierarchy among the various bases of jurisdiction that it permits").

[363] On extradition, see chapter VII on the future programme of work, below.

[364] See, for example, *Kumar Lama* v. *Regina*, [2014] EWCA Crim.1729 (Court of Appeal) (7 Aug. 2014), para. 71(3) (the High Court concluding that the "Convention against Torture does not establish a hierarchy of possible jurisdictions or embody any principle of *forum conveniens*. While it is correct that, in any given case, it may be more convenient or effective to prosecute in one jurisdiction rather than another, for example because of the availability of evidence, this is no more than a reflection of the circumstances of the particular case").

territory the alleged offender is present is well situated to proceed with a prosecution if it is willing and able to do so.[365]

116. Finally, treaties containing an obligation to establish jurisdiction whenever an alleged offender is present invariably include a provision that provides an alternative to the exercise of jurisdiction over any particular alleged offender. Most treaties addressing crimes contemplate the alternative of the State extraditing the alleged offender to another State party. Having pre-dated the establishment of contemporary international criminal courts and tribunals, most of these treaties do not expressly contemplate the alternative of surrendering the alleged offender to an international court or tribunal. Recent treaties, however, do expressly recognize this possibility. For example, the International Convention for the Protection of All Persons from Enforced Disappearance expresses this type of jurisdiction as follows in article 9, paragraph 2:

> Each State party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, *unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized*.[*]

B. Not excluding other national jurisdiction

117. As indicated above, article 5, paragraph 3, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment makes clear that, while the Convention is obligating each State party to enact certain types of jurisdiction, it is not excluding any other jurisdiction that is available under the national law of that State party.[366] Indeed, to preserve the right of States parties to establish national jurisdiction beyond the scope of the treaty, international treaties typically leave open the possibility that a State party may have other jurisdictional grounds upon which to hold an alleged offender accountable.[367] In their joint separate opinion to the *Arrest Warrant* case, Judges Higgins, Kooijmans and Buergenthal cited *inter alia* to article 5, paragraph 3, and stated:

> We reject the suggestion that the battle against impunity is "made over" to international treaties and tribunals, with national courts having no competence in such matters. Great care has been taken when formulating the relevant treaty provisions not to exclude other grounds of jurisdiction that may be exercised on a voluntary basis.[368]

118. Numerous international and regional instruments contain such a provision, including the Convention on the suppression of unlawful seizure of aircraft (art. 4); the Convention for the suppression of unlawful acts against the safety of civil aviation (art. 5, para. 3); the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (art. 3); the International Convention against the taking of hostages (art. 5, para. 3); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 5, para. 3); the Inter-American Convention to Prevent and Punish Torture (art. 12); the Convention on the Safety of United Nations and Associated

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[365] At least one writer has argued that "States must take account of a wish to exercise jurisdiction by States which have a stronger claim to exercise jurisdiction" (Ingelse, p. 326).

[366] For analysis, see Burgers and Danelius, p. 133.

[367] Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, Revised draft United Nations Convention against Transnational Crime (A/AC.254/4/Rev.4), p. 20, footnote 102. See also Lambert.

[368] *Arrest Warrant of 11 April 2000* (see footnote 302 above), Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, pp. 78–79, para. 51.

Personnel (art. 10, para. 5); the Inter-American Convention on the Forced Disappearance of Persons (art. X); the International Convention for the Suppression of Terrorist Bombings (art. 6, para. 5); the International Convention for the Suppression of the Financing of Terrorism (art. 7, para. 6); the United Nations Convention against Transnational Organized Crime (art. 15, para. 6); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 9, para. 3); and the ASEAN Convention on Counter Terrorism (art. VII, para. 4).

119. One concern in formulating a clause that preserves the ability of a State party to establish or maintain other forms of national jurisdiction is to avoid any implication that the treaty is authorizing such other national jurisdiction, or that such jurisdiction need not conform with applicable rules of international law. For that reason, for example, the International Convention for the Suppression of the Financing of Terrorism contains a clause in its article on jurisdiction that reads as follows: "Without prejudice to the norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State party in accordance with its domestic law."[369]

C. Draft article 6. Establishment of national jurisdiction

120. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

Draft article 6. Establishment of national jurisdiction

1. Each State shall take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5, paragraphs 1 and 2, when:

(*a*) the offence is committed in any territory under its jurisdiction or control or on board a ship or aircraft registered in that State;

(*b*) the alleged offender is one of its nationals; and

(*c*) the victim is one of its nationals and the State considers it appropriate.

2. Each State shall also take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5, paragraphs 1 and 2, when the alleged offender is present in any territory under its jurisdiction or control, unless it extradites or surrenders the person in accordance with draft article 9, paragraph 1.

3. Without prejudice to applicable rules of international law, this draft article does not exclude the establishment of other criminal jurisdiction by a State in accordance with its national law.

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[369] Art. 7, para. 6. See also the United Nations Convention against Corruption, art. 42, para. 6 ("Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State party in accordance with its domestic law").

CHAPTER III

General investigation and cooperation for identifying alleged offenders

121. When a situation arises where crimes against humanity may have occurred in territory under the jurisdiction or control of a State, there is value in having that State conduct a general investigation into whether such crimes have occurred or are occurring. Such a general investigation into a possible situation of crimes against humanity (addressed in this chapter) should be contrasted with more the specific investigation into whether a particular person committed crimes against humanity (addressed below in chapter IV). This more general investigation allows the State to determine, as a general matter, whether crimes against humanity have been or are occurring, which may allow the State to take immediate measures to prevent further occurrence, as well as help to establish a general basis for more specific investigations of alleged offenders by that State or States to which those alleged offenders may flee.

122. The idea of conducting an investigation of crimes against humanity where they are committed, as a prelude to prosecution of alleged offenders, has featured in various international instruments. For example, in 1973, the General Assembly of the United Nations adopted the Principles of international co-operation in the detection, arrest, extradition, and punishment of persons guilty of war crimes and crimes against humanity, which provide that "crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment".[370] Several earlier General Assembly resolutions also recognized the importance of investigating crimes against humanity and called on States to take necessary measures in this regard.[371]

123. This expectation of a State investigating crimes that are thought to have occurred within its territory has featured in numerous treaties, which obligate the State party to investigate whenever there is a reasonable ground to believe that offences covered by the treaty have been committed.[372] For example, article 12 of

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[370] General Assembly resolution 3074 (XXVIII) of 3 December 1973, para. 1.

[371] See, for example, General Assembly resolution 2583 (XXIV) of 15 December 1969, preamble and paragraph 1 ("*Convinced* that the thorough investigation of war crimes and crimes against humanity ... constitute[s] an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion of international peace and security ... 1. *Calls upon* all the States concerned to take the necessary measures for the thorough investigation of war crimes and crimes against humanity"); General Assembly resolution 2712 (XXV) of 15 December 1970, preamble and para. 5 ("*Convinced* that a thorough investigation of war crimes and crimes against humanity, as well as the arrest, extradition and punishment of persons guilty of such crimes—wherever they may have been committed— ... are important elements in the prevention of similar crimes now and in the future ... 5. *Once again requests* the States concerned, if they have not already done so, to take the necessary measures for the thorough investigation of war crimes and crimes against humanity"); and General Assembly resolution 2840 (XXVI) of 18 December 1971, preamble ("*Firmly convinced* of the need for international co-operation in the thorough investigation of war crimes and crimes against humanity").

[372] The Geneva Conventions for the protection of war victims contain a variation on this idea of a general investigation, albeit one focused more on identifying specific offenders. Those Conventions oblige States generally to "search for persons alleged to have committed" grave breaches of the Conventions. See the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49 ("Each High Contracting Party

the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that "[e]ach State party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction". That general obligation is different from the State's obligation under article 6, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to undertake a specific inquiry or investigation of the facts concerning a particular alleged offender (addressed in chapter IV of this report). Further, this general "obligation to investigate is not triggered by the fact that a suspected [perpetrator] is on the territory of a State party, but by the suspicion of the competent authorities of a State party that [a relevant] act might have been committed in any territory under its jurisdiction".[373] Hence, this investigation differs because it "must take place *irrespective* of whether the suspect is known or present".[374]

124. Comparable obligations to conduct a general investigation, formulated in various ways, may be found in the Inter-American Convention to Prevent and Punish Torture ("if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process" (art. 8)); the International Convention for the Protection of All Persons from Enforced Disappearance ("Where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, the [competent authorities] shall undertake an investigation, even if there has been no formal complaint" (art. 12, para. 2)); and the 2011 Council of Europe convention on preventing and combating violence against women and domestic violence ("Parties shall take the necessary legislative or other measures to ensure that investigations and judicial proceedings in relation to all forms of violence covered by the scope of this Convention are carried out without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings").[375]

125. This obligation to conduct a general investigation is addressed only to the State in which offences may have occurred; it is not addressed to other States. In the context of crimes against humanity, the State with jurisdiction or control over the territory in which the crime appears to have occurred is best situated to conduct such an initial investigation, so as to determine whether a crime in fact has occurred and, if so, whether governmental forces under its control committed the crime, whether forces under the control of another State did so, or whether it was

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shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches"); the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50 (same); the Geneva Convention Convention relative to the Treatment of Prisoners of War, art. 129 (same); and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 146 (same).

[373] Nowak and McArthur, p. 414.

[374] Ingelse, p. 335.

[375] Art. 49, para. 1. See also article 55, paragraph 1 ("Parties shall ensure that investigations into or prosecution of offences established in accordance with Articles 35, 36, 37, 38 and 39 of this Convention shall not be wholly dependent upon a report or complaint filed by a victim if the offence was committed in whole or in part on its territory, and that the proceedings may continue even if the victim withdraws her or his statement or complaint").

committed by a non-State organization. Such an investigation can lay the foundation not only for pursuing alleged offenders, but also for helping to prevent recurrence of such crimes by identifying their source.

126. Such an obligation typically requires that the investigation be carried out whenever there is reason to believe or a reasonable ground to believe that the offence has been committed.[376] Indeed, since it is likely that "the more systematic the practice of torture becomes in a given country, the smaller the number of official torture complaints", a violation of article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is possible even if the State has received no complaints from individuals.[377] Likewise, the Committee against Torture maintains that State authorities must "proceed automatically" to an investigation whenever there are reasonable grounds to believe that an act of torture or ill-treatment has been committed, with "no special importance being attached to the grounds for suspicion".[378]

127. The Committee against Torture has also found violations of article 12 if the State's investigation is not "prompt and impartial".[379] The requirement of promptness means that as soon as there is suspicion of a crime having been committed, investigations should be initiated immediately or without any delay.[380] In most cases where the Committee found a lack of promptness, no investigation had been carried out at all or had only been commenced after a long period of time had passed. For example, the Committee considered "that a delay of 15 months before an investigation of allegations of torture is initiated, is unreasonably long and not in compliance with the requirement of article 12 of the Convention".[381] The rationales underlying the promptness requirement are that physical traces that may prove torture can quickly disappear, and that complaining victims may be in danger of further torture, which a prompt investigation may be able to prevent.[382]

128. The requirement of impartiality generally means that States must proceed with their investigations in a serious, effective and unbiased manner.[383] This requirement is essential, as "any investigation which proceeds from the assumption that no such acts have occurred, or in which there is a desire to protect suspected

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[376] See *Blanco Abad* v. *Spain*, Communication No. 59/1996, Views of the Committee against Torture (CAT/C/20/D/59/1996), para. 8.2. See also *Dimitrijevic* v. *Serbia and Montenegro*, Communication No. 172/2000, *Selected Decisions of the Committee against Torture, vol. I, Eleventh to Thirty-Eighth Sessions (November 1993–May 2007)*, United Nations publication (Sales No. E.08.XIV.8), pp. 89–92, at p. 92, para. 7.3.

[377] Nowak, p. 246.

[378] *Dhaou Belgacem Thabti* v. *Tunisia*, Communication No. 187/2001, Views of the Committee against Torture (CAT/C/31/D/187/2001), para.10.4. See also *Blanco Abad* v. *Spain* (footnote 376 above), paras. 8.2–8.6.

[379] See, for example, Committee against Torture, *Bairamov* v. *Kazakhstan*, Communication No. 497/2012, Views of the Committee against Torture (CAT/C/52/D/497/2012), paras. 8.7–8.8.

[380] Nowak and McArthur, p. 434.

[381] Committee against Torture, *Halimi-Nedzibi* v. *Austria*, Communication No. 8/1991, *Selected Decisions of the Committee against Torture, vol. I, Eleventh to Thirty-Eighth Sessions (November 1993–May 2007)*, United Nations publication (Sales No. E.08.XIV.8), p. 15, para. 13.5.

[382] *Blanco Abad* v. *Spain* (see footnote 376 above), para. 8.2 ("The Committee observes that promptness is essential both to ensure that the victim cannot continue to be subjected to such acts and because in general, unless the methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappear"). See Burgers and Danelius, pp. 144–145.

[383] Nowak and McArthur, p. 435.

officials, cannot be considered effective".[384] In some instances, the Committee against Torture has recommended that investigation of offences be "under the direct supervision of independent members of the judiciary".[385] In other instances, it has stated that "[a]ll government bodies not authorized to conduct investigations into criminal matters should be strictly prohibited from doing so".[386] The Committee has stated that an impartial investigation gives equal weight to assertions that the offence did or did not occur, and then pursues appropriate avenues of inquiry, such as checking available government records, examining relevant government officials or ordering exhumation of bodies.[387]

129. Some treaties that do not expressly contain such an obligation to investigate have nevertheless been read as implicitly containing one. For example, although the International Covenant on Civil and Political Rights contains no such express obligation, the Human Rights Committee has repeatedly asserted that States must investigate, in good faith, violations to the International Covenant on Civil and Political Rights.[388] Among other things, the Committee has said:

> Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. ... A failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.[389]

130. Several regional bodies have also interpreted their legal instruments to contain a duty to conduct a general investigation even when they do not explicitly feature one. For the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), this concept arose in order to deal effectively with extraordinary circumstances in certain regions of Turkey, involving cases of ill-treatment, disappearances and the destruction of a village.[390] In these instances, "the Court has relied upon the evidence of a lack of

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[384] Burgers and Danelius, p. 145.

[385] Consideration of reports submitted by States parties under article 19 of the Convention–Ecuador, Report of the Committee against Torture, *Official Records of the General Assembly, Forty-Ninth Session, Supplement No. 44* (A/49/44), p. 17, para. 105.

[386] Consideration of reports submitted by States parties under article 19 of the Convention–Guatemala, Report of the Committee against Torture, *Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 44* (A/56/44), p. 34, para. 76(d).

[387] *M'Barek* v. *Tunisia*, Communication No. 60/1996, Views of the Committee against Torture (CAT/C/23/D/60/1996), paras. 11.9–11.10. See also Nowak and McArthur, p. 435.

[388] See, for example, *Shukurova* v. *Tajikistan*, Communication No. 1044/2002, Views of the Human Rights Committee (CCPR/C/86/D/1044/2002), para. 8.2; *Kouidis* v. *Greece*, Communication No. 1070/2002, Views of the Human Rights Committee (CCPR/C/86/D/1070/2002), para. 9; *Agabekova* v. *Uzbekistan*, Communication No. 1071/2002, Views of the Human Rights Committee (CCPR/C/89/D/1071/2002), para. 7.2; and *Karimov and Nursatov* v. *Tajikistan*, Communications Nos. 1108/2002 and 1121/2002, Views of the Human Rights Committee (CCPR/C/89/D/1108&1121/2002), para. 7.2.

[389] Human Rights Committee, General Comment No. 31 on the nature of the general legal obligation on States parties to the Covenant (CCPR/C/21/Rev.1/Add.13), para. 15.

[390] Crawford, p. 667 (*citing* the European Court of Human Rights cases of *Aksoy* v. *Turkey, Application no. 21987/93, Judgment on Merits and Just Satisfaction of 18 December 1996*, European Court of Human Rights; *Timurtaş* v. *Turkey, Application no. 23531/94, Report of the Commission adopted on 19 October 1998*, European Commission of Human Rights; *Kurt* v. *Turkey, Application no. 24276/94, Judgment on Merits and Just Satisfaction of 25 May 1998*, European Court of Human Rights; *Çakici* v. *Turkey, Application no. 23657/94, Judgment of 8 July 1999*, European Court of Human Rights, Grand Chamber; *Menteş and Others* v. *Turkey, Application no. 23186/94, Judgment on Merits and Just Satisfaction of 28 November 1997*, European Court of Human Rights, Grand Chamber; *Ergi* v. *Turkey, Application no. 23818/94, Judgment on Merits and Just Satisfaction of 28 July 1998*, European Court of Human Rights; and *Kaya* v. *Turkey, Application no. 22729/93, Judgment on Merits and Just Satisfaction of 19 February 1998*, European Court of Human Rights.

effective investigation, or of any investigation, by the authorities, as evidence of violations of Article 2 (the right to life), Article 3 (prohibition on torture), Article 5 (the right to liberty and security of person), ... Article 8 (the right to home and family life) ... [and] Article 13 (the right to an effective remedy)".[391] For example, in the case of *Ergi* v. *Turkey*, the Court found that the Convention implicitly imposes such a duty so as to ensure that an "effective, independent investigation is conducted" into any deaths alleged to be a result of use of force by agents of the State.[392] The Court reasoned that this requirement is implicit in the "right to life" provision of article 2 of the Convention, when read in conjunction with the general duty under article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention".[393] In part because of "the lack of an adequate and effective investigation", the Court found a violation of article 2 of the Convention.[394] The more recent case of *Bati and Others* v. *Turkey* confirmed that an investigation must be undertaken if there are sufficiently clear indications that the relevant crime has been committed, even if no complaint has been made.[395] The Inter-American Court of Human Rights has applied a similar concept.[396]

Draft article 7. General investigation and cooperation for identifying alleged offenders

131. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

Draft article 7. General investigation and cooperation for identifying alleged offenders

1. Each State shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reason to believe that a crime against humanity has been or is being committed in any territory under its jurisdiction or control.

2. If the State determines that a crime against humanity is or has been committed, the State shall communicate, as appropriate, the general findings of that investigation to any other State whenever there is reason to believe that nationals of the other State have been or are involved in the crime. Thereafter, that other State shall promptly and impartially investigate the matter.

3. All States shall cooperate, as appropriate, to establish the identity and location of persons who may have committed an offence referred to in draft article 5, paragraphs 1 or 2.

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[391] *Ibid.*

[392] See *Ergi* v. *Turkey* (footnote 390 above), para. 85.

[393] *Ibid.*, para. 82.

[394] *Ibid.*, para. 86.

[395] *Bati and Others* v. *Turkey, Applications nos. 33097/96 and 57834/00, Judgment of 3 June 2004*, European Court of Human Rights, First Section, para. 133.

[396] See Brownlie, p. 579 (citing *Paniagua Morales* et al. and *Extrajudicial Executions and Forced Disappearances* v. *Peru*).

CHAPTER IV

Exercise of national jurisdiction when an alleged offender is present

132. Once a crime of international concern occurs and one or more States generally investigate the matter, a State may then obtain or receive information that an alleged offender is present in the State's territory. When this happens, the State usually will conduct a preliminary investigation for the purpose of determining whether to submit the matter to prosecution or to extradite or surrender the alleged offender to other competent authorities. Further, the State may take the alleged offender into custody (or pursue other measures) to ensure the continued presence of the alleged offender. Other States, or perhaps an international tribunal, interested in prosecuting the alleged offender may request extradition or surrender.

133. Both the General Assembly and the Security Council of the United Nations have recognized the importance of such measures in the context of crimes against humanity. Thus, the General Assembly has called upon "all States concerned to take the necessary measures for the thorough investigation of ... crimes against humanity ... and for the detection, arrest, extradition and punishment of all persons ... guilty of crimes against humanity who have not yet been brought to trial or punished".[397] Similarly, it has asserted that "refusal by States to co-operate in arrest, extradition, trial and punishment of persons guilty of ... crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law".[398] The Security Council has emphasized "the responsibility of States to comply with their relevant obligations to end impunity and to thoroughly investigate and prosecute persons responsible for ... crimes against humanity or other serious violations of international humanitarian law in order to prevent violations, avoid their recurrence and seek sustainable peace, justice, truth and reconciliation".[399]

134. Treaties addressing crimes typically set forth rights and obligations relating to the investigation and possible detention of an alleged offender when the person is present in the territory of a State party. For example, article 10 of the International Convention for the Protection of All Persons from Enforced Disappearance, which is derived from the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment "with some simplifications",[400] provides in paragraphs 1 and 2 that, upon reviewing information made available to it concerning an alleged offender, a State party shall conduct a preliminary investigation, shall (if necessary) take the alleged offender into custody, and shall notify other relevant States as to the measures it has taken and whether it intends to exercise its jurisdiction in the matter. Reviewing such a provision in the context of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

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[397] General Assembly resolution 2583 (XXIV) of 15 December 1969, para. 1.

[398] General Assembly resolution 2840 (XXVI) of 18 December 1971, para. 4.

[399] Security Council resolution 1984 (2009) of 11 November 2009, para. 10.

[400] Commission on Human Rights, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), para. 89.

Punishment,[401] the ICJ has explained that their purpose is "to enable proceedings to be brought against the suspect, in the absence of his extradition, and to achieve the objective and purpose of the Convention, which is to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts".[402]

135. Such an approach when an alleged offender is present is viewed as foundational to making any such treaty effective and has not been controversial when treaties of this kind are drafted.[403] The following discussion focuses on the three main elements of a treaty provision on this issue: the obligations to conduct a preliminary investigation; to ensure continuing presence of the alleged offender; and to notify other States with an interest in the alleged offender. A fourth element sometimes present in such articles — a right for a non-national alleged offender to communicate with his or her consular officer — is addressed in chapter VI with respect to "fair treatment of an alleged offender."

A. Conducting a preliminary investigation

136. Once a State obtains or receives information that an alleged offender is present in territory under the State's jurisdiction or control, a common step is to conduct a preliminary investigation of the matter. If the information is received from another State or some other source, then the preliminary investigation may include confirming the identity and location of the person. In any event, such a preliminary investigation will allow the State to establish the facts relevant for deciding whether the matter is to be submitted to prosecution within that State, or whether the alleged offender is to be extradited or surrendered to other competent authorities.

137. This preliminary investigation should be contrasted with the more general investigation addressed in chapter IV of this report. That investigation seeks to determine, at a general level, whether a crime against humanity has occurred or is occurring and, if so, who the offenders may be and where they may be located. Here, in light of having determined where a particular alleged offender may be located, the State where the alleged offender is present conducts a preliminary investigation with respect to that specific person for the purpose of confirming his or her identity, determining whether a prosecutable offence exists, and then deciding whether to submit the matter to prosecution or to extradite or surrender.[404] Conducting a preliminary investigation also helps to ensure application of the "fundamental principle of fairness and equality" to the accused by confirming that there is a reasonable basis upon which to hold the accused for prosecution or extradition or surrender.[405] At the same time, this preliminary investigation should be contrasted with a full investigation that will occur as a part of an actual

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[401] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (see footnote 98 above), p. 450, para. 72 ("incorporating the appropriate legislation into domestic law ... would allow the State in whose territory a suspect is present immediately to make a preliminary inquiry into the facts ..., a necessary step in order to enable that State, with knowledge of the facts, to submit the case to its competent authorities for the purpose of prosecution").

[402] *Ibid.*, p. 451, para. 74. See also Nowak and McArthur, p. 337 (explaining such State obligations in the context of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

[403] Lambert, p. 168.

[404] Nowak and McArthur, p. 340.

[405] *Ibid.*, p. 342.

prosecution, either in the State where the alleged offender is found, or in a State or by a tribunal to whom the person is extradited or surrendered.

138. The national criminal laws of States typically provide for such preliminary investigation to determine whether a prosecutable offence exists. Norway, for example, provides that "[a] criminal investigation shall be carried out when as a result of a report or other circumstances there are reasonable grounds to inquire whether any criminal matter requiring prosecution by the public authorities subsists".[406] The purpose of this investigation is "to obtain the necessary information ... for deciding whether an indictment should be preferred", among others.[407] Other States, such as the Russian Federation[408] and Ukraine,[409] similarly require a preliminary investigation for all potential criminal matters.

139. While the Convention on the Prevention and Punishment of the Crime of Genocide and the Geneva Conventions for the protection of war victims contain no obligation to conduct a preliminary investigation, contemporary treaties addressing crimes typically do contain such an obligation. These treaties include the Convention on the suppression of unlawful seizure of aircraft (art. 6); the Convention for the suppression of unlawful acts against the safety of civil aviation (art. 6, para. 2); the International Convention against the taking of hostages (art. 6, para. 1); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 6, para. 2); the Inter-American Convention to Prevent and Punish Torture (art. 8); the International Convention for the Suppression of Terrorist Bombings (art. 7, para. 1); the International Convention for the Suppression of the Financing of Terrorism (art. 9, para. 1); the OAU Convention on the Prevention and Combating of Terrorism, 1999 (art. 7, para. 1); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 10, para. 2); and the ASEAN Convention on Counter Terrorism (art. VIII, para. 2).

140. The ICJ has emphasized the importance of such a preliminary investigation in the context of article 6, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, finding that it is intended, like any inquiry carried out by the competent authorities, to corroborate or not the suspicions regarding the person in question. Those authorities who have the task of drawing up a case file conduct the investigation and collect facts and evidence; "this may consist of documents or witness statements relating to the events at issue and to the suspect's possible involvement in the matter concerned".[410] The Court has further noted that "the choice of means for conducting the inquiry remains in the hands of the States Parties", but that "steps must be taken as soon as the suspect is identified in the territory of the State, in order to conduct an investigation of that case".[411]

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[406] Norway, the Criminal Procedure Act of 22 May 1981 No. 25, with subsequent amendments, the latest made by Act of 30 June 2006 No. 53, section 224, available from www.legislationline.org/documents/section/criminal-codes.

[407] *Ibid.*, section 226.

[408] The Criminal Procedural Code of the Russian Federation, No. 184-FZ of 18 December 2001 (as amended 1 March 2012), chap. 21, available from www.legislationline.org/documents/section/criminal-codes.

[409] The Criminal Procedure Code of Ukraine enacted by the Law of 28 December 1960 (as amended in 2010), art. 111, available from www.legislationline.org/documents/section/criminal-codes.

[410] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (see footnote 98 above), p. 453, para. 83.

[411] *Ibid.*, p. 454, para. 86. For a generalized discussion of this case and its import, see Cryer *et al.*, pp. 75–76.

B. Ensuring continuing presence

141. Taking an individual into custody who is alleged to have committed a serious offence, pending an investigation to determine whether the matter should be submitted to prosecution, is a common step in national criminal proceedings, in particular to avoid further criminal acts and to avoid a risk of flight by the alleged offender. For example, German law provides that "[r]emand detention may be ordered against the accused if he is strongly suspected of the offence and if there is a ground for arrest... A ground for arrest shall exist if on the basis of certain facts ... considering the circumstances of the individual case, there is a risk that the accused will evade the criminal proceedings (risk of flight)".[412] Comparable provisions exist in many other jurisdictions, such as Norway,[413] the Russian Federation,[414] Switzerland,[415] Ukraine[416] and the United States of America.[417] Furthermore some States, such as Germany, specifically allow for such detention when "an accused [is] strongly suspected ... of having committed a criminal offence pursuant to ... the Code of Crimes against International Law".[418]

142. Treaties addressing crimes typically include a provision setting forth an obligation to ensure continuing presence of the alleged offender, if necessary by taking him or her into custody. While the Convention on the Prevention and Punishment of the Crime of Genocide does not contain such a provision, the Geneva Conventions for the protection of war victims indirectly address the matter by obligating each State party to bring persons alleged to have committed grave breaches "before its own courts".[419] More contemporary treaties expressly oblige States parties to take the alleged offender into custody or to take such other legal measures as are necessary to ensure his or her presence. These treaties include the Convention on the suppression of unlawful seizure of aircraft (art. 6); the Convention for the suppression of unlawful acts against the safety of civil aviation (art. 6, para. 1); the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (art. 6, para. 1); the International Convention against the taking of hostages (art. 6, para. 1); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 6, para. 1); the Convention on the Safety of United Nations and Associated Personnel (art. 13, para. 1); the International Convention for the Suppression of Terrorist Bombings (art. 7, para. 2); the International Convention for the Suppression of the Financing of Terrorism (art. 9, para. 2); the OAU Convention on the Prevention and Combating of Terrorism, 1999 (art. 7, para. 2); the United

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[412] The Code of Criminal Procedure of Germany of 7 April 1987 (as amended 31 October 2008), available from www.legislationline.org/documents/section/criminal-codes.

[413] Norway, the Criminal Procedure Act of 22 May 1981 No. 25 (see footnote 406 above), section 171.

[414] The Criminal Procedural Code of the Russian Federation, No. 184-FZ of 18 December 2001 (see footnote 408 above), arts. 91 and 108.

[415] The Criminal Procedure Code of Switzerland of 5 October 2007 (status as of 1 Jan. 2015), arts. 225–226, available from www.legislationline.org/documents/section/criminal-codes.

[416] The Criminal Procedure Code of Ukraine enacted by the Law of 28 December 1960 (see footnote 409 above), art. 98-1, available from www.legislationline.org/documents/section/criminal-codes.

[417] United States Code, Title 18, section 3142(*e*)-(*f*)(1).

[418] The Code of Criminal Procedure of Germany of 7 April 1987 (see footnote 412 above), sect. 112.

[419] See the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50; the Geneva Convention relative to the Treatment of Prisoners of War, art. 129; and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 146.

Nations Convention against Transnational Organized Crime (art. 16, para. 9); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 10, para. 1); and the ASEAN Convention on Counter Terrorism (art. VIII, para. 3).

143. In treaties containing an obligation to ensure continuing presence, the overall objective is to keep the alleged offender in the State party's territory "for the time necessary to enable extradition or criminal proceedings to commence".[420] The primary option is usually "arrest and detention, i.e. police custody up to a few days followed by pre-trial detention and/or detention pending deportation".[421] Whether detention is required for the entire pre-trial or deportation period will depend on the facts of the case, including the likelihood of flight or destruction of evidence.[422] If ongoing detention is deemed unnecessary by the State party, then some writers maintain that the State party must take other "legal measures" to ensure the presence of the suspect at trial. To fulfil their obligations under such treaties, "States parties are expected to take the same measures as are provided for in their national law in the case of any ordinary offence of a serious nature", which may include "house arrest, release on bail, the confiscation of travel documents, an obligation to report regularly to the police and similar restrictions on freedom of movement".[423]

144. Of course any "action taken by a State in this regard 'must be considered in light of the requirement ... that there be grounds to believe that the alleged offender has committed one or more of the crimes set forth'".[424] While a State party has wide latitude to assess whether taking an alleged offender into custody is necessary, it is bound to act in good faith in the exercise of that discretion.[425] In so doing, States should "examine ... the conditions laid down in [their] national law relating, in particular, to the degree of suspicion required and to the existence of a danger of flight".[426] As long as they do not interfere with "the general obligation to extradite or prosecute", States parties may also consider national legal time limits relating to detention to determine whether that detention should continue.[427] Ultimately, the obligation is "on the State party in whose territory [the alleged offender] is found ... to take the appropriate measures to prevent his escape pending that State's decision on whether he should be extradited or the case submitted to its competent authorities for the purpose of prosecution".[428]

145. The Committee against Torture considered this obligation in the context of an alleged offender, Ely Ould Dah, who was arrested and indicted in France in 1999, but then released pending trial. Mr. Ould Dah fled France and was tried, convicted, and sentenced *in absentia*. The Committee expressed regret "that the State party did not take the necessary steps to keep Mr. Ould Dah in its territory and ensure his presence

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[420] Lambert, p. 173. See *Yearbook ... 1972*, vol. II, p. 317.

[421] Nowak and McArthur, p. 338.

[422] *Ibid.*, p. 339.

[423] *Ibid.*, pp. 338–339. See also Burgers and Danelius, p. 135.

[424] Lambert, p. 170 (citing *Yearbook ... 1972*, vol. II, p. 317 (commentary to article 5 of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons).

[425] Burgers and Danelius, p. 134; and Lambert, pp. 168 and 171.

[426] Burgers and Danelius, p. 134.

[427] *Ibid.*

[428] *Yearbook ... 1972*, vol. II, p. 317, para (5) of the commentary to article 5 of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons.

at his trial", pursuant to its obligation under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The recommendation was "that, where the State party has established its jurisdiction over acts of torture in a case in which the alleged perpetrator is present in any territory under its jurisdiction, it should take the necessary steps to have the person concerned taken into custody or to ensure his or her presence".[429]

C. Notifying other interested States

146. In the absence of a treaty relationship, there is little authority to support the proposition that a State exercising its criminal jurisdiction is under an obligation to notify other States that may have an interest in the proceedings (leaving aside the consular notification obligation in chapter VI, section D, of this report). In treaties relating to crimes, however, it is common to include a provision obligating a State party that has taken an alleged offender into custody (or taken such other legal measures as are necessary to ensure his or her presence) to notify other interested States parties, meaning those States parties who also may exercise national jurisdiction to prosecute the alleged offender (for example, based on "territorial", "nationality" or "passive personality" jurisdiction). Typically, such notification must indicate the general findings of its preliminary investigation, the measures that have been taken by the State party (such as detention of the alleged offender) and whether the State party intends to exercise its jurisdiction to submit the matter to prosecution.

147. Although the Convention on the Prevention and Punishment of the Crime of Genocide and the Geneva Conventions for the protection of war victims do not contain such a provision, more contemporary treaties do. Such treaties include the Convention on the suppression of unlawful seizure of aircraft (art. 6); the Convention for the suppression of unlawful acts against the safety of civil aviation (art. 6, para. 4); the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (art. 6, para. 1); the International Convention against the taking of hostages (art. 6, paras. 2 and 6); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 6, para. 4); the Convention on the Safety of United Nations and Associated Personnel (art 13, para. 2); the International Convention for the Suppression of Terrorist Bombings (art. 7, para. 6); the International Convention for the Suppression of the Financing of Terrorism (art. 9, para. 6); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 10, para. 2); and the ASEAN Convention on Counter Terrorism (art. VIII, para. 6).

148. Such an obligation "is of a general character" and should be "made even where there is already a firm intention to prosecute the person concerned in the State where he was arrested".[430] The obligation serves the important purpose of enabling other "States to decide whether or not they wish to request extradition from the custodial

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[429] Conclusions and recommendations of the Committee against Torture, France (CAT/C/FRA/CO/3 and Add.1), para. 14.

[430] Burgers and Danelius, p. 135. See also Lambert, pp. 174–175 (citing *Yearbook ... 1972*, vol. II, at p. 318 (noting a twofold purpose to this requirement, namely that "it is desirable to notify States that are carrying on a search for the alleged offender that he has been found" and that "it will permit any State with a special interest in the particular crime committed to determine if it wishes to request extradition and to commence the preparation of necessary documents and the collection of the required evidence")).

State. In addition, the State whose national the alleged [perpetrator] is might be enabled to take appropriate measures of diplomatic or consular protection".[431]

D. Draft article 8. Exercise of national jurisdiction when an alleged offender is present

149. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

Draft article 8. Exercise of national jurisdiction when an alleged offender is present

1. If a State obtains or receives information indicating that a person present in territory under its jurisdiction or control may have committed an offence referred to in draft article 5, paragraphs 1 or 2, the State shall immediately carry out a preliminary investigation to establish the relevant facts with respect to that person.

2. If the circumstances so warrant, the State shall take the person into custody or take such other legal measures as are necessary to ensure his or her presence during the investigation and at criminal, extradition or surrender proceedings. The custody and other legal measures shall be as provided for in the law of that State, but shall be in conformity with international law and maintained only for such time as is reasonable.

3. The State shall notify the States referred to in draft article 6, paragraph 1, of the general findings of its preliminary investigation, of the circumstances warranting any detention, and whether it intends to submit the matter to its competent authorities for the purpose of prosecution.

CHAPTER V

Aut dedere aut judicare

150. The "obligation to extradite or prosecute", commonly referred to as the principle of *aut dedere aut judicare*, is an obligation that calls upon a State in which an alleged offender is present either to submit the alleged offender to prosecution within the State's own national system or to extradite him or her to another State that is willing to do so within its national system. This obligation is contained in numerous multilateral treaties addressing crimes.[432]

151. At times, the General Assembly of the United Nations has invoked the *aut dedere aut judicare* principle when calling upon States to deny refuge to offenders for different kinds of offences, often relating to terrorism.[433] Similarly,

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[431] Nowak and McArthur, p. 341. See also Burgers and Danelius, p. 135; and Lambert, p. 183.

[432] See, generally, the Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)": Study by the Secretariat (A/CN.4/630). See also Bassiouni and Wise.

[433] See, for example, the following General Assembly resolutions: 34/145 of 17 December 1979; 38/130 of 19 December 1983; 40/61 of 9 December 1985; 42/159 of 7 December 1987; 44/29 of 4 December 1989; 46/51 of 9 December 1991; 47/133 of 18 December 1992; 49/60 of 9 December 1994; 51/210 of 17 December 1996; 51/60 of 12 December 1996; 54/164 of 17 December 1999; and 61/133 of 14 December 2006. See also the following reports of the

the Security Council of the United Nations has referred to the principle on many occasions.[434] In none of these instances has the subject been crimes against humanity, although some of these resolutions have related to offences that in certain circumstances may constitute crimes against humanity, such as enforced disappearance or to the protection of civilians or United Nations personnel in armed conflict. The ICJ has not addressed the customary international law status of the principle of *aut dedere aut judicare*, but some of its judges have done so in separate opinions.[435]

152. The Commission's 1996 draft code of crimes against the peace and security of mankind defined crimes against humanity in article 18 and further provided, in article 9, that "[w]ithout prejudice to the jurisdiction of an international criminal court, the State party in the territory of which an individual alleged to have committed a crime set out in article 17, 18, 19 or 20 is found shall extradite or prosecute that individual".[436] The commentary to this provision stated in part:

> (2) Article 9 establishes the general principle that any State in whose territory an individual alleged to have committed a crime set out in articles 17 to 20 of part two is bound to extradite or prosecute the alleged offender. ... The fundamental purpose of this principle is to ensure that individuals who are responsible for particularly serious crimes are brought to justice by providing for the effective prosecution and punishment of such individuals by a competent jurisdiction.
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> (3) The obligation to prosecute or extradite is imposed on the custodial State in whose territory an alleged offender is present. The custodial State has an obligation to take action to ensure that such an individual is prosecuted either by the national authorities of that State or by another State which indicates that it is willing to prosecute the case by requesting extradition. The custodial State is in a unique position to ensure the implementation of the Code by virtue of the presence of the alleged offender in its territory. Therefore the custodial State has an obligation to take the necessary and reasonable steps to apprehend an alleged offender and to ensure the prosecution and trial of such an individual by a competent jurisdiction. The obligation to extradite or prosecute applies to a State which has custody of "an individual alleged to have committed a crime". This phrase is used to refer to a person who is singled out, not on the basis of unsubstantiated allegations, but on the basis of pertinent factual information.
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> (4) The national laws of various States differ concerning the sufficiency of evidence required to initiate a criminal prosecution or to grant a request for extradition. The custodial State

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Secretary-General on measures to eliminate international terrorism: A/56/160 of 3 July 2001 and A/60/228 of 12 August 2005.

[434] See, for example, the following Security Council resolutions: 1267 (1999) of 15 October 1999; 1269 (1999) of 19 October 1999; 1333 (2000) of 19 December 2000; 1456 (2003) of 20 January 2003; 1502 (2003) of 26 August 2003; 1566 (2004) of 8 October 2004; 1624 (2005) of 14 September 2005; 1674 (2006) of 28 April 2006; and 1738 (2006) of 23 December 2006.

[435] See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 3, at p. 24, para. 2 (Joint Declaration of Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley: "in general international law there is no obligation to prosecute in default of extradition"); p. 38, para. 12 (Dissenting Opinion of Judge Bedjaoui: same); p. 69 (Dissenting Opinion of Judge Weeramantry: "The principle *aut dedere aut judicare* is an important facet of a State's sovereignty over its nationals and the well-established nature of this principle in customary international law is evident"); and p. 82 (Dissenting Opinion of Judge Ajibola: same). For an analysis, see Bassiouni and Wise, pp. 58–69. In the *Arrest Warrant* case, Judges Higgins, Kooijmans and Buergenthal acknowledged the importance of the principle of *aut dedere aut judicare*, especially as it relates to crimes against humanity, but did not address its status as customary international law (*Arrest Warrant of 11 April 2000* (see footnote 302 above), Separate Opinion of Judges Higgins, Kooijmans and Buergenthal), pp. 78–79, paras. 51–52).

[436] Draft code of crimes against the peace and security of mankind (see footnote 134 above), p. 30.

> would have an obligation to prosecute an alleged offender in its territory when there was sufficient evidence for doing so as a matter of national law unless it decided to grant a request received for extradition. ...
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> (5) Whereas the sufficiency of evidence required to institute national criminal proceedings is governed by national law, the sufficiency of evidence required to grant an extradition request is addressed in the various bilateral and multilateral treaties. ...
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> (6) The custodial State has a choice between two alternative courses of action either of which is intended to result in the prosecution of the alleged offender. The custodial State may fulfil its obligation by granting a request for the extradition of an alleged offender made by any other State or by prosecuting that individual in its national courts. Article 9 does not give priority to either alternative course of action.
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> ...
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> (8) The introductory clause of article 9 recognizes a possible third alternative course of action by the custodial State which would fulfil its obligation to ensure the prosecution of an alleged offender who is found in its territory. The custodial State could transfer the alleged offender to an international criminal court for prosecution. Article 9 does not address the cases in which a custodial State would be permitted or required to take this course of action since this would be determined by the statute of the future court.[437]

153. In 2014, the Commission adopted the final report of its Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*), which touched upon but did not resolve whether there existed such an obligation in customary international law, including with respect to crimes against humanity. The report stated:

> (54) When the Commission adopted the draft code in 1996, the provision on the obligation to extradite or prosecute thereunder represented progressive development of international law... . Since the completion of the 1996 draft code, there may have been further developments in international law that reflect State practice and *opinio juris* in this respect.
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> (55) The Commission notes that in 2012 the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* ruled that it had no jurisdiction to entertain the claims of Belgium relating to the alleged breaches by Senegal of obligations under customary international law because at the date of filing by Belgium of the Application the dispute between Belgium and Senegal did not relate to breaches of obligations under customary international law. Thus, an opportunity has yet to arise for the Court to determine the customary international law status or otherwise of the obligation to extradite or prosecute.[438]

154. At the same time, the Commission observed "that there are important gaps in the present conventional regime governing the obligation to extradite or prosecute which may need to be closed. Notably, there is a lack of international conventions with this obligation in relation to most crimes against humanity".[439]

155. As noted at the outset of this chapter, an *aut dedere aut judicare* obligation is contained in numerous multilateral treaties addressing crimes. Some of these treaties impose an obligation upon a State party to submit the matter to prosecution only if that State party refuses to surrender the alleged offender following a request for extradition from another State party.[440] Other treaty provisions impose such an

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[437] *Ibid.* pp. 31–32.

[438] *Yearbook ... 2014*, vol. II (Part Two), para. 65 (citing the judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (see footnote 98 above), p. 461, para. 120).

[439] *Ibid.* See also Akhavan.

[440] See, for example, the International Convention for the Suppression of Counterfeiting Currency, article 9 ("The obligation to take proceedings is subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence"). See also the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, arts. 7–8; the Convention for the Prevention and Punishment of Terrorism, art. 9; the Convention for the Suppression of the Traffic in Persons and of the

obligation whenever the alleged offender is present in the territory of the State party, regardless of whether some other State party seeks extradition.[441] Under either approach, the State party's obligation can be satisfied by agreeing to extradition of the alleged offender.[442]

156. The latter approach is the most common in treaties and the dominant formula for this approach derives from the (Hague) Convention on the suppression of unlawful seizure of aircraft, and therefore is commonly referred to as the "Hague formula". Article 7 of the Convention reads:

> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

157. Although regularly termed the obligation to extradite or "to prosecute", the obligation imposed by the Convention on the suppression of unlawful seizure of aircraft is to "to submit the case" to prosecution, meaning to submit the matter to prosecutorial authorities who may or may not seek an indictment. If the competent authorities determine that there is insufficient evidence of guilt, then the accused need not be indicted, nor stand trial or face punishment.[443] The *travaux préparatoires* of the Convention indicate that the formula established "the obligation of apprehension of the alleged offender, a possibility of extradition, the obligation of reference to the competent authority and the possibility of prosecution".[444]

158. No reservations have been made to the 1970 Convention on the suppression of unlawful seizure of aircraft that affect the provisions related to *aut dedere aut judicare*. Moreover, the Hague formula is reflected in approximately three quarters of the multilateral treaties drafted since 1970 that include an obligation to extradite or submit to prosecution.[445] Many of these treaties replicate the Convention on the

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Exploitation of the Prostitution of Others, art. 9; the Single Convention on Narcotic Drugs, 1961, art. 36, para. 2(*a*)(iv); and the Convention on psychotropic substances, art. 22, para. 2(*a*)(iv).

[441] See, for example, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50; the Geneva Convention relative to the Treatment of Prisoners of War, art. 129; and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 146: "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case."

Although no reservations have been made to the Geneva Conventions for the protection of war victims concerning this *aut dedere aut judicare* provision, this particular formulation has received little support in other treaties. The Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) is the only other multilateral convention to use this formula, which it does by *renvoi* (art. 85, paras. 1 and 3, and art. 88, para. 2). See the Study by the Secretariat (footnote 432 above), p. 22.

[442] See *ibid.*, para. 126. See also the judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (footnote 98 above), p. 422 (Separate Opinion of Judge Yusuf).

[443] See the Study by the Secretariat (footnote 432 above), pp. 74–75, para. 147.

[444] Statement of Chairman Gilbert Guillaume (delegate from France), ICAO [International Civil Aviation Organization] Legal Committee, *Minutes and Documents relating to the Subject of Unlawful Seizure of Aircraft* (Doc. 8877-LC/161), para. 15, 13th meeting (3 Mar. 1970), 17th Sess. (Montreal, 9 Feb.-11 Mar. 1970).

[445] See the Study by the Secretariat (footnote 432 above), pp. 41–43, para. 108. These conventions include (in chronological order): the Convention for the suppression of unlawful acts against the

suppression of unlawful seizure of aircraft verbatim or almost verbatim, with few or modest substantive changes, while others are more loosely based on the Hague formula. Examples include the Convention for the suppression of unlawful acts against the safety of civil aviation;[446] the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents;[447] the International Convention against the taking of hostages;[448] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[449] the Convention on the Safety of United Nations and Associated Personnel;[450] the International Convention for the Suppression of Terrorist

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safety of civil aviation (1971), art. 7; the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (1973), art. 7; the International Convention against the taking of hostages (1979), art. 8; the Convention on the physical protection of nuclear material (1979), art. 10; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), art. 7; the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988), art. III; the Convention for the suppression of unlawful acts against the safety of maritime navigation, art. 10, para. 1; the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), art. 6(9); the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (1989), art. 13; the Convention on the Safety of United Nations and Associated Personnel (1994), art. 14; the Convention on combating bribery of foreign public officials in international business transactions (1997), art. 10, para. 3; the International Convention for the Suppression of Terrorist Bombings (1997), art. 8; the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1999), art. 1, para. 1; the International Convention for the Suppression of the Financing of Terrorism (1999), art. 10, para. 1; the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child prostitution and Child Pornography (2000), art. 5(5); the United Nations Convention against Transnational Organized Crime (2000), art. 16, para. 10; the United Nations Convention against Corruption, art. 44, para. 11; the International Convention for the Suppression of Acts of Nuclear Terrorism, art. 11; and the International Convention for the Protection of All Persons from Enforced Disappearance (2006), art. 11.

[446] Art. 7 ("The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State").

[447] Art. 7 ("The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State").

[448] Art. 8, para. 1 ("The State party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a grave nature under the law of that State").

[449] Art. 7 ("1. The State party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution. 2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1").

[450] Art. 14 ("The State party in whose territory the alleged offender is present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that State. Those authorities shall take their decision in the same manner as in the case of an ordinary offence of a grave nature under the law of that State").

Bombings;[451] the International Convention for the Suppression of the Financing of Terrorism;[452] the United Nations Convention against Transnational Organized Crime;[453] the United Nations Convention against Corruption;[454] the International Convention for the Suppression of Acts of Nuclear Terrorism;[455] the International Convention for the Protection of All Persons from Enforced Disappearance;[456] and the ASEAN Convention on Counter Terrorism.[457]

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[451] Art. 8, para. 1 ("The State party in the territory of which the alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State").

[452] Art. 10, para. 1 ("The State party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State").

[453] Art. 16, para. 10 ("A State party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution").

[454] Art. 44, para. 11 ("A State party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution").

[455] Art. 11, para. 1 ("The State party in the territory of which the alleged offender is present shall, in cases to which [the article on jurisdiction] applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State").

[456] Art. 11 ("1. The State party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution. 2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State party. In the cases referred to in article 9, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 9, paragraph 1").

[457] Art. XIII, para. 1 ("The Party in the territory of which the alleged offender is present shall, in cases to which Article VII of this Convention applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the domestic laws of that Party. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the domestic laws of that Party").

159. The Hague formula also can be found in many regional conventions.[458] In fact, the 1957 European Convention on Extradition (art. 6(1)(d)) served as a model for the Convention on the suppression of unlawful seizure of aircraft.[459] Fifty States have ratified that Convention, including all member States of the Council of Europe, as well as three non-European States (Israel, the Republic of Korea, and South Africa).

160. In *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, the ICJ analysed the Hague formula in the context of article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

> 90. As is apparent from the *travaux préparatoires* of the Convention, Article 7, paragraph 1, is based on a similar provision contained in the [Convention on the suppression of unlawful seizure of aircraft], signed at The Hague on 16 December 1970. The obligation to submit the case to the competent authorities for the purpose of prosecution (hereinafter the "obligation to prosecute") was formulated in such a way as to leave it to those authorities to decide whether or not to initiate proceedings, thus respecting the independence of States parties' judicial systems. These two conventions emphasize, moreover, that the authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of the State concerned (Article 7, paragraph 2, of the [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] and Article 7 of the [Convention on the suppression of unlawful seizure of aircraft]). It follows that the competent authorities involved remain responsible for deciding on whether to initiate a prosecution, in the light of the evidence before them and the relevant rules of criminal procedure.
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> 91. The obligation to prosecute provided for in Article 7, paragraph 1, is normally implemented in the context of the [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] after the State has performed the other obligations provided for in the preceding articles, which require it to adopt adequate legislation to enable it to criminalize torture, give its courts universal jurisdiction in the matter and make an inquiry into the facts. These obligations, taken as a whole, may be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven...
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> ...

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[458] See the Study by the Secretariat (footnote 432 above), pp. 41–43, para. 108. These conventions include (in chronological order): the Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance (1971), art. 5; the Organization of African Unity Convention for the elimination of mercenarism in Africa (1977), arts. 8 and 9, paras. 2–3; the European Convention on the suppression of terrorism (1988), art. 7; the Inter-American Convention to Prevent and Punish Torture (1985), art. 14; the South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism (1987), art. 4; the Inter-American Convention on the Forced Disappearance of Persons (1994), art. 6; the Inter-American Convention on International Traffic in Minors (1994), art. 9; the Inter-American Convention against Corruption (1996), art. XIII, para. 6; the Inter-American Convention against the illicit manufacturing of and trafficking in firearms, ammunition, explosives and other related materials (1997), art. XIX, para. 6; the Arab Convention on the Suppression of Terrorism (1998), art. 6; the Criminal Law Convention on Corruption (1999), art. 27, para. 5; the Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999), art. 6; the Convention on cybercrime (2001), art. 24, para. 6; the African Union Convention on Preventing and Combating Corruption (2003), art. 15, para. 6; the Council of Europe Convention on the Prevention of Terrorism (2005), art. 18; the Council of Europe Convention on Action Against Trafficking in Human Beings (2005), art. 31, para. 3; and the Association of Southeast Asian Nations (ASEAN) Convention on Counter-Terrorism (2007), art. 13(1).

[459] ICAO [International Civil Aviation Organization] Legal Committee, Minutes and Documents relating to the Subject of Unlawful Seizure of Aircraft (Document 8877-LC/161), 13th meeting (3 March 1970), 17th Session, Montreal, 9 February–11 March 1970), p. 69, para. 33; and Guillaume, pp. 354 and 368.

> 94. The Court considers that Article 7, paragraph 1, requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. That is why Article 6, paragraph 2, obliges the State to make a preliminary inquiry immediately from the time that the suspect is present in its territory. The obligation to submit the case to the competent authorities, under Article 7, paragraph 1, may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect.
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> 95. However, if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.
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> 114. While Article 7, paragraph 1, of the Convention does not contain any indication as to the time frame for performance of the obligation for which it provides, it is necessarily implicit in the text that it must be implemented within a reasonable time, in a manner compatible with the object and purpose of the Convention.
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> 115. The Court considers that the obligation on a State to prosecute, provided for in Article 7, paragraph 1, of the Convention, is intended to allow the fulfilment of the Convention's object and purpose, which is "to make more effective the struggle against torture" (Preamble to the Convention). It is for that reason that proceedings should be undertaken without delay.
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> 120. The purpose of these treaty provisions is to prevent alleged perpetrators of acts of torture from going unpunished, by ensuring that they cannot find refuge in any State party. The State in whose territory the suspect is present does indeed have the option of extraditing him to a country which has made such a request, but on the condition that it is to a State which has jurisdiction in some capacity, pursuant to Article 5 of the Convention, to prosecute and try him.[460]

161. The Court also found that various factors could not justify a failure to comply with these obligations: the financial difficulties of a State;[461] referral of the matter to a regional organization;[462] or difficulties with implementation under the State's internal law.[463]

162. The idea of satisfying the State party's obligation by surrendering the alleged offender to an international court or tribunal (sometimes referred to as a "third alternative" or as part of the "triple alternative") has also arisen in recent years, especially in conjunction with the establishment of the International Criminal Court and other international and special courts and tribunals.[464] For example, the International Convention for the Protection of All Persons from Enforced Disappearance, in article 11, paragraph 1, provides:

> The State party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.

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[460] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (see footnote 98 above), p. 454–461, paras. 90–91, 94–95, 114–115 and 120.

[461] *Ibid.* at p. 460, para. 112.

[462] *Ibid.*

[463] *Ibid.* at p. 460, para. 113.

[464] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/680, para. 27.

163. The phrase "international criminal tribunal" used in such a formulation is intended to encompass not only the International Criminal Court, but also *ad hoc* international criminal tribunals and special courts or tribunals that combine international and national law.[465] The phrase "whose jurisdiction it has recognized" would appear to be unnecessary, although it implicitly acknowledges that not all States have accepted the jurisdiction of the same international criminal tribunals and therefore that the capacity to surrender to such tribunals will vary by State.

164. Most treaties containing the Hague formula also include a clause to the effect that the "authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State party".[466] The objective of such a clause is to help avoid any possibility of the situation being exploited for political reasons, resulting in trials on the basis of spurious accusations and fabricated evidence, and thereby leading to frictions between States.[467] Thus, in these proceedings, "normal procedures relating to serious offences, both in the extradition and criminal proceedings, and the normal standards of evidence shall apply".[468]

165. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance add a further sentence which provides that, in situations where the State party's jurisdiction is based solely on the presence of the alleged offender, the standards of evidence required for prosecution and conviction shall be no less stringent than the standards which apply in other States that have jurisdiction (for example, jurisdiction based on territoriality or nationality). This sentence seeks to ensure that alleged offenders are not prosecuted by a third State on the basis of insufficient or inadequate evidence. According to some writers, if the evidence in the third State is insufficient, and the territorial or national State is not able or willing to supply the necessary evidence, the third State should extradite the alleged offender where possible to a jurisdiction where the evidence exists, or should delay proceedings in order to negotiate a solution with the concerned States.[469] A practical difficulty with such an obligation, however, is the assumption that prosecutors and judges in a State party can readily ascertain and apply the standards of evidence required for prosecution and conviction that apply in other States parties having jurisdiction over the matter.

Draft article 9. *Aut dedere aut judicare*

166. As previously noted, in 2014 the Commission observed "that there are important gaps in the present conventional regime governing the obligation to extradite or prosecute which may need to be closed. Notably, there is a lack of international conventions with this obligation in relation to most crimes against humanity".[470] In this context, the Commission also recalled that it had placed on its programme of work the present topic, "which would include as one element of a new treaty an obligation to extradite or prosecute for those crimes".[471] Moreover, the

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[465] See *Yearbook ... 2014*, vol. II (Part Two), para. 35; and Scovazzi and Citroni, p. 303.

[466] See footnotes 446 to 457 above.

[467] Nowak and McArthur, p. 365.

[468] *Ibid.*, p. 366, citing Burgers and Danelius, p. 138.

[469] *Ibid.*, p. 366.

[470] *Yearbook ... 2014*, vol. II (Part Two), para. (14); see also *ibid.*, para. (31).

[471] *Ibid.*

Commission recommended "that States consider the Hague formula in undertaking to close any gaps in the existing conventional regime".[472] Finally, the Commission characterized as one of the essential elements of a contemporary *aut dedere aut judicare* formula, a provision for the "third alternative" (in other words, the notion that the obligation may be satisfied by surrendering the alleged offender to a competent international tribunal), noting in particular article 11, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance.[473]

167. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

Draft article 9. Aut dedere aut judicare

1. If a person alleged to have committed an offence referred to in draft article 5, paragraphs 1 and 2, is found in any territory under the jurisdiction or control of a State, that State shall submit the matter to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal.

2. If the State submits the matter to its competent authorities for the purpose of prosecution, those authorities shall decide whether and how to prosecute in the same manner as they would for any ordinary offence of a serious nature under the law of that State.

CHAPTER VI

Fair treatment of an alleged offender

168. All States contain within their national law protections of one degree or another for persons who they investigate, detain, try and punish for a criminal offence. Such protections may be specified in a constitution, statute, administrative rule or judicial precedent. Further, detailed rules may be codified or a broad standard may be set referring to "fair treatment", "due process", "judicial guarantees" or "equal protection". Such protections are extremely important in ensuring that the extraordinary power of the State's criminal justice apparatus is not improperly brought to bear upon a suspect, among other things preserving for that individual the ability to contest fully the State's allegations before an independent court (hence, allowing for an "equality of arms").

169. Such protections are now well recognized in international criminal law and human rights law.[474] At the most general level, such protections are identified in the 1948 Universal Declaration of Human Rights, which provides in article 10 that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".[475] Further, article 11 provides that "[e]veryone

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[472] *Ibid.*

[473] *Ibid.*, paras. (34)-(36).

[474] Doswald-Beck ("The right to a fair trial has, since the Universal Declaration of Human Rights ... become established as one of the fundamental pillars of international law to protect individuals against arbitrary treatment.").

[475] General Assembly resolution 217 A (III) of 10 December 1948. See also Lehtimaja and Pellonpää.

charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence" and that "[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed".[476]

170. The principal statement of a universal character with respect to such guarantees appears in article 14 of the International Covenant on Civil and Political Rights. Article 14 sets forth a series of rights, including that: (1) all persons shall be equal before the courts and tribunal; (2) every person is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law; (3) the press and the public may be excluded from the trial only for specified reasons; (4) any judgment rendered in a criminal case shall be made public except in limited circumstances; (5) every person charged with a criminal offence shall be presumed innocent until proved guilty according to law; (6) every person is to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge; (7) every person must have adequate time and facilities for the preparation of his or her defines and to communicate with counsel of his own choosing; (8) every person shall be tried without undue delay; (9) every person has a right to be tried in his or her presence, and to defend himself in person or through legal assistance of his own choosing (and to be informed of this right and provided legal assistance if justice so requires); (10) every person may examine, or have examined, the witnesses against him or her; (11) every person may have the free assistance of an interpreter if he or she cannot understand or speak the language used in court; (12) every person may not be compelled to testify against himself or herself, or to confess guilt; (13) juvenile persons shall be tried using procedures that take account of their age and the desirability of promoting their rehabilitation; (14) everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law; and (15) no one shall be tried or punished again for an offence for which he has already been finally convicted or acquitted (the principle of *ne bis in idem* ("not twice the same thing") or as protection from "double jeopardy"). The purpose of article 14 of the International Covenant on Civil and Political Rights, obviously, is to ensure the proper administration of justice to an alleged offender.[477]

171. As a general matter, instruments establishing or setting standards for an international court or tribunal generally seek to replicate with some degree of specificity the kinds of standards set forth in article 14 of the International Covenant on Civil and Political Rights, while instruments that address national laws typically provide a broad standard that is intended to acknowledge and incorporate the specific standards of article 14.

172. The Nürnberg Charter contained an article on a "fair trial for defendants" which addressed elements such as the clarity of the indictment, the language of the proceedings, the right to counsel and the right of the defines to access to evidence (art. 16). The Commission's 1954 draft code of offences against the peace and

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[476] General Assembly resolution 217 A (III) of 10 December 1948.

[477] Human Rights Committee, General Comment No. 32 (CCPR/C/GC/32).

security of mankind[478] contained no article on protections for the alleged offender. In the 1996 draft code of crimes against the peace and security of mankind, however, article 11 lists several protections to be accorded to individuals charged with a crime against the peace and security of mankind.[479] In its commentary to article 11, the Commission distinguished the 1954 draft code, which "did not address the procedures to be followed in the investigation and prosecution of alleged perpetrators" because it was "envisaged as an instrument of substantive criminal law to be applied by a national court or possibly an international criminal court in accordance with the rules of procedure and evidence of the competent national or international jurisdiction".[480] In regards to the 1996 draft code of crimes against the peace and security of mankind, however, the Commission:

> considered that an instrument of a universal character, such as the Code, should require respect for the international standard of due process and fair trial set forth in article 14 of the International Covenant on Civil and Political Rights. The essential provisions of article 14 of the Covenant are therefore reproduced in article 11 to provide for the application of these fundamental judicial guarantees to persons who are tried by a national court or an international court for a crime against the peace and security of mankind contained in the Code.[481]

173. The instruments regulating the International Tribunal for the Former Yugoslavia,[482] the International Tribunal for Rwanda,[483] the Special Court for Sierra Leone,[484] the Special Tribunal for Lebanon,[485] the Special Panels for Serious Crimes

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[478] *Yearbook ... 1954*, vol. II, pp. 151–152.

[479] Specifically, article 11 provides:

"Judicial guarantees

"1. An individual charged with a crime against the peace and security of mankind shall be presumed innocent until proved guilty and shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts and shall have the rights:

"(*a*) In the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law;

"(*b*) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

"(*c*) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

"(*d*) To be tried without undue delay;

"(*e*) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him if he does not have sufficient means to pay for it;

"(*f*) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

"(*g*) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

"(*h*) Not to be compelled to testify against himself or to confess guilt.

"2. An individual convicted of a crime shall have the right to his conviction and sentence being reviewed according to law." Draft code of crimes against the peace and security of mankind (see footnote 134 above), pp. 33–36.

[480] *Ibid.*, p. 33, para. (1) of the commentary to draft article 11.

[481] *Ibid.*, p. 34, para. (6) of the commentary to draft article 11.

[482] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (see footnote 99 above), art. 21.

[483] Statute of the International Tribunal for Rwanda (see footnote 100 above), art. 20.

[484] Statute of the Special Court for Sierra Leone (see footnote 101 above), art. 17.

[485] Statute of the Special Tribunal for Lebanon (see footnote 170 above), art. 16.

in East Timor,[486] the Extraordinary Chambers in the Courts of Cambodia,[487] the Iraqi Supreme Criminal Tribunal[488] and the Extraordinary African Chambers within the Senegalese Judicial System[489] contain various provisions addressing protections for defendants. With respect to the International Criminal Court, the Rome Statute of the International Criminal Court contains articles devoted to *nullem crimen sine lege* (art. 22), *nulla poena sine lege* (art. 23), exclusion of jurisdiction over persons under eighteen (art. 26), rights of persons during an investigation (art. 55), trial in the presence of the accused (art. 63), presumption of innocence (art. 66) and rights of the accused (art. 67). The last of these articles catalogues in considerable detail protections for the defendant, akin to those contained in article 14 of the International Covenant on Civil and Political Rights.[490]

174. By contrast, most treaties addressing crimes or specific types of human rights violations within a national legal system, such as torture, do not repeat these myriad protections for an alleged offender. Instead, such treaties contain a provision that expresses general obligations of protection for the alleged offender, which essentially cross-reference to the more detailed protections contained in other instruments or in customary international law. A good example of such a provision may be found in the Convention on the Safety of United Nations and Associated Personnel, which provides in article 17 (Fair treatment):

> 1. Any person regarding whom investigations or proceedings are being carried out in connection with any of the crimes set out in article 9 shall be guaranteed fair treatment, a fair trial and full protection of his or her rights at all stages of the investigations or proceedings.
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> 2. Any alleged offender shall be entitled:
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> (*a*) To communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights; and
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> (*b*) To be visited by a representative of that State or those States.

175. The following subsections address these elements of fair treatment, fair trial, human rights protections generally, and the right to communicate with one's State of nationality or other relevant State.

A. Fair treatment

176. As noted above, most treaties addressing crimes or specific types of human rights violations within a national legal system do not repeat the myriad human rights protections for an alleged offender, but instead contain a provision that expresses general obligations of protection. Often this takes the form of obligating the State to accord "fair treatment" to the alleged offender at all stages of the proceeding.

177. Examples of such a "fair treatment" provision may be found in the Convention on the prevention and punishment of crimes against internationally

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[486] UNTAET/REG/2000/15 (see footnote 102 above), sects. 12– 13.

[487] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (see footnote 103 above), arts. 33 new–35 new.

[488] Statute of the Iraqi Special Tribunal (see footnote 104 above), art. 20.

[489] Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990 (see footnote 105 above), art. 21.

[490] See, for example, Zappalà, p. 1325; and Schabas, "Article 67", pp. 845–868.

protected persons, including diplomatic agents;[491] the International Convention against the taking of hostages;[492] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[493] the Convention for the suppression of unlawful acts against the safety of maritime navigation;[494] the Convention on the rights of the child;[495] International Convention Against the Recruitment, Use, Financing and Training of Mercenaries;[496] the International Convention for the Suppression of Terrorist Bombings;[497] the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict;[498] the International Convention for the Suppression of the Financing of Terrorism;[499] the United Nations Convention against Transnational Organized Crime;[500] the United Nations Convention against Corruption;[501] the International

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[491] Art. 9 ("Any person regarding whom proceedings are being carried out in connection with any of the crimes set forth in article 2 shall be guaranteed fair treatment at all stages of the proceedings").

[492] Art. 8, para. 2 ("Any person regarding whom proceedings are being carried out in connexion with any of the offences set forth in article 1 shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the law of the State in the territory of which he is present").

[493] Art. 7, para. 3 ("Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings").

[494] Art. 10, para. 2 ("Any person regarding whom proceedings are being carried out in connection with any of the offences set forth in article 3 shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided for such proceedings by the law of the State in the territory of which he is present").

[495] Art. 40, para. 2(*b*) ("Every child alleged as or accused of having infringed the penal law has at least the following guarantees: ... (iii): "To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians").

[496] Art. 11 ("Any person regarding whom proceedings are being carried out in connection with any of the offences set forth in the present Convention shall be guaranteed at all stages of the proceedings fair treatment and all the rights and guarantees provided for in the law of the State in question. Applicable norms of international law should be taken into account").

[497] Art. 14 ("Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights").

[498] Art. 17, para. 2 ("Without prejudice to, if applicable, the relevant rules of international law, any person regarding whom proceedings are being carried out in connection with the Convention or this Protocol shall be guaranteed fair treatment and a fair trial in accordance with domestic law and international law at all stages of the proceedings, and in no cases shall be provided guarantees less favorable to such person than those provided by international law").

[499] Art. 17 ("Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law").

[500] Art. 16, para. 13 ("Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State party in the territory of which that person is present").

[501] Art. 44, para. 14 ("Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present").

Convention for the Suppression of Acts of Nuclear Terrorism;[502] the International Convention for the Protection of All Persons from Enforced Disappearance;[503] and the ASEAN Convention on Counter Terrorism.[504]

178. These conventions do not define the term "fair treatment",[505] but the term is viewed as incorporating the specific rights possessed by an alleged offender, such as those under article 14 of the International Covenant on Civil and Political Rights. Thus, when crafting article 8 of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, the Commission asserted that the formulation of "fair treatment at all stages of the proceedings" was "intended to incorporate all the guarantees generally recognized to a detained or accused person", and that "[a]n example of such guarantees is found in article 14 of the International Covenant on Civil and Political Rights".[506] Further. the Commission noted that the "expression 'fair treatment' was preferred, because of its generality, to more usual expressions such as 'due process', 'fair hearing' or 'fair trial' which might be interpreted in a narrow technical sense".[507] Finally, the Commission also explained that the formulation of "all stages of the proceedings" is "intended to safeguard the rights of the alleged offender from the moment he is found and measures are taken to ensure his presence until a final decision is taken on the case".[508]

179. A broad reference to "fair treatment" rather than to specific rights also avoids having to repeat the range of rights to which any individual is entitled under international human rights law and, as such, avoids inadvertent limitation of those rights. For example, the *travaux préparatoires* of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment indicate that for this reason the drafters rejected the proposal by the Netherlands to provide to alleged torturers the narrower "guarantees of a fair and equitable trial" in favour of the broader "fair treatment at all stages of the proceedings" language of Sweden.[509]

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[502] Art. 12 ("Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights").

[503] Art. 11, para. 3 ("Any person against whom proceedings are brought in connection with an offence of enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings. Any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law").

[504] Art. VIII, para. 1 ("Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the laws of the Party in the territory of which that person is present and applicable provisions of international law, including international human rights law").

[505] Lambert, p. 204.

[506] Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, *Yearbook ... 1972*, vol. II, p. 320, draft article 8 and the commentary thereto. See also Costello, p. 492 ("if there has been any breach of the rights referred to in Article 14 of the International Covenant [on Civil and Political Rights], in respect to a person charged with an offense under the [Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents], it would be open to a Contracting State to allege that there has been a breach of a State's obligations under Article 9 of that Convention").

[507] *Yearbook ... 1972*, vol. II, p. 320.

[508] *Ibid.*

[509] Nowak and McArthur, pp. 366–367.

According to the *travaux préparatoires*, this broader formulation encompassed all of the fair trial obligations articulated in article 14 of the International Covenant on Civil and Political Rights and ensured protection to the alleged offender at both pre-trial and trial stages of the proceedings.[510] Likewise, the drafters of the International Convention for the Protection of All Persons from Enforced Disappearance used the "fair treatment" construction as the template for its article addressing defendant's rights, also in order not to limit the range of rights.[511]

B. Fair trial

180. The concept of "fair treatment" is generally regarded as including within it a right to a fair trial. As discussed below, however, the right to a fair trial is considered so important that some treaties addressing crimes have made a point of identifying both a right to "fair treatment" and to a "fair trial."

181. Among the protections accorded by States under their national laws to persons being tried for a criminal offence is the right to a fair trial.[512] Such a right is identified in article 10 of the Universal Declaration of Human Rights, which provides that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".[513] Similar provisions exist in regional human rights declarations, such as the American Declaration of the Rights and Duties of Man,[514] the Cairo Declaration on Human Rights in Islam[515] and the Charter of Fundamental Rights of the European Union.[516]

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[510] *Ibid.*, p. 367 ("the suspected torturer must enjoy all guarantees of a fair trial as stipulated in Article 14" of the International Covenant on Civil and Political Rights).

[511] See, for example, Commission on Human Rights, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), para. 91.

[512] See, generally, Weissbrodt and Wolfrum. See also ICRC, Customary IHL Database, "Practice relating to Rule 100. Fair trial guarantees", available from www.icrc.org/customary-ihl/eng/docs/v2_rul_rule100 (providing national legislation for Afghanistan, Argentina, Armenia, Australia, Azerbaijan, Bangladesh, Belarus, Belgium, Bosnia and Herzegovina, Botswana, Bulgaria, Burundi, Cambodia, Canada, China, Colombia, Congo, Cook Islands, Croatia, Cyprus, the Democratic Republic of the Congo, Denmark, Estonia, Ethiopia, Finland, France, Georgia, Germany, Hungary, India, Iraq, Ireland, Israel, Jordan, Kenya, Lithuania, Luxembourg, Malawi, Malaysia, Mali, Mauritius, the Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Papua New Guinea, Peru, Poland, the Republic of Korea, the Republic of Moldova, Romania, Rwanda, Senegal, Serbia, Seychelles, Singapore, Slovenia, Somalia, South Africa, Spain, Sri Lanka, Sudan, Tajikistan, Thailand, Uganda, the United Kingdom, the United States of America, Uruguay, Vanuatu, the Bolivarian Republic of Venezuela, Yugoslavia and Zimbabwe).

[513] General Assembly resolution 217 A (III) of 10 December 1948.

[514] Adopted at the Ninth International Conference of American States, held in Bogota in 1948, *International Conferences of American States, Second Supplement, 1942–1954*, Washington, D.C., Pan American Union, 1958, p. 262, art. XVIII ("Right to a fair trial: Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights) and art. XXVI ("Right to due process of law: Every accused person is presumed to be innocent until proved guilty. Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment").

[515] Adopted at the Islamic Conference of Foreign Ministers held in Cairo from 31 July to 5 August 1990. An English translation is available in Status of preparation of publication, studies and documents for the World Conference on Human Rights, note by the Secretariat, addendum:

182. Article 14, paragraph 1, of the International Covenant on Civil and Political Rights also identified this specific right stating, *inter alia*, that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law" (art. 14, para. 1). Likewise, regional human rights treaties also provide for such a right, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms;[517] the American Convention on Human Rights: "Pact of San José, Costa Rica" (art. 8); the African Charter on Human and Peoples' Rights (art. 7); and the Arab Charter on Human Rights.[518]

183. The Human Rights Committee found this right to a fair trial to be "a key element of human rights protection" and a "procedural means to safeguard the rule of law".[519] Among other things, the Committee stated in 2007 in its General Comment No. 32:

> 18. The notion of a "tribunal" in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature. Article 14, paragraph 1, second sentence, guarantees access to such tribunals to all who have criminal charges brought against them. This right cannot be limited, and any criminal conviction by a body not constituting a tribunal is incompatible with this provision. ...
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> 19. The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. ...
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> ...
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> 21. The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer

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Contribution of the Organisation of the Islamic Conference (A/CONF.157/PC/62/Add.18). Article 19(*e*) reads: "A defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence").

[516] Art. 47 ("Right to an effective remedy and to a fair trial: Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law").

[517] Art. 6 (Right to a fair trial). For analysis of the Convention's right to a fair trial, see *Golder* v. *United Kingdom, Application no. 4451/70, Judgment of 21 February 1975*, European Court of Human Rights, *Judgments and Decisions: Series A*, vol. 18, para. 28.

[518] Adopted at Tunis in May 2004, at the 16th Summit of the League of Arab States (for the English version, see *Boston University International Law Journal*, vol. 24, No. 2 (2006), p. 147). Article 13, paragraph 1, provides that "[e]verybody has the right to a fair trial in which sufficient guarantees are ensured, conducted by a competent, independent and impartial tribunal established by law, in judging the grounds of criminal charges brought against him or in determining his rights and obligations").

[519] Human Rights Committee, General Comment No. 32 (CCPR/C/GC/32), para. 2. See also Bair, p. 56.

> to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.
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> ...
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> 25. The notion of fair trial includes the guarantee of a fair and public hearing. Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive. A hearing is not fair if, for instance, the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby impinging on the right to defence, or is exposed to other manifestations of hostility with similar effects.
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> ...
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> 28. All trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large.[520]

184. The right of the defendant to a fair trial is also expressly recognized in the statutes of many international criminal tribunals. Thus, the Nürnberg Charter included such a right (art. 16), which was acknowledged in the Commission's Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.[521] Similarly, the right to a fair trial appears in the Statute of the International Tribunal for the Former Yugoslavia,[522] the Statute of the International Tribunal for Rwanda[523] and the Rome Statute of the International Criminal Court (art. 67, para. 1). The same is true for the instruments regulating the Special Court for Sierra Leone,[524] the Special Tribunal for Lebanon,[525] the Extraordinary Chambers in the Courts of Cambodia,[526] the Iraqi Supreme Criminal Tribunal[527] and the Extraordinary African Chambers within the Senegalese Judicial System.[528]

185. Notably, article 3, paragraph 1(*d*) common to the Geneva Conventions for the protection of war victims prohibits "the passing of sentences ... without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples", and the Geneva Convention relative to the Treatment of Prisoners of War (art. 130), the Geneva Convention relative to the Protection of Civilian Persons in Time of War (art. 147) and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (art. 85, para. 4(e)) consider depriving a protected person of a fair trial in international

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[520] Human Rights Committee, General Comment No. 32 (CCPR/C/GC/32), paras. 18–19, 21, 25 and 28. Various decisions by the Committee with respect to petitions also shed light on the Committee's view as to the meaning of article 14, paragraph 1. See, for example, *Gridin* v. *Russian Federation*, Communication No. 770/1997, Views of the Human Rights Committee (CCPR/C/69/D/770/1997 (2000)), para. 8.2. For an academic commentary, see Bossuyt, p. 284.

[521] *Yearbook ... 1950*, vol. II, p. 375 (principle V provides that "[a]ny person charged with a crime under international law has the right to a fair trial on the facts and law").

[522] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (see footnote 99 above), art. 21, para. 2.

[523] Statute of the International Tribunal for Rwanda (see footnote 100 above), art. 20, para. 2.

[524] Statute of the Special Court for Sierra Leone (see footnote 101 above), art. 17, para. 2

[525] Statute of the Special Tribunal for Lebanon (see footnote 170 above), art. 16, para. 2.

[526] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (see footnote 103 above), art. 33 new.

[527] Statute of the Iraqi Special Tribunal (see footnote 104 above), art. 20.

[528] Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990 (see footnote 105 above), art. 21, para. 2.

armed conflict to be a grave breach. It is also listed as a war crime in the Statute of the International Tribunal for the Former Yugoslavia,[529] the Statute of the International Tribunal for Rwanda[530] and the Rome Statute of the International Criminal Court (art. 8, paras. 2(a)(vi) and (c)(iv)).

186. As previously noted, most treaties addressing crimes or specific types of human rights violations within a national legal system, such as torture, do not repeat the myriad protections for an alleged offender, but instead contain a broad obligation that the States parties accord "fair treatment" to the alleged offender at all stages of the proceeding. That obligation is understood as including a guarantee that the alleged offender will receive a fair trial. Yet, in some treaties the relevant provision also independently highlights the right to a fair trial before a competent, independent, and impartial court or tribunal.

187. Thus, the Convention on the Safety of United Nations and Associated Personnel refers to both "fair treatment" and a "fair trial" (art. 17). Similarly, the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict indicates that "any person regarding whom proceedings are being carried out in connection with the Convention or this Protocol shall be guaranteed fair treatment *and a fair trial*[*] in accordance with domestic law and international law at all stages of the proceedings, and in no cases shall be provided guarantees less favourable to such person than those provided by international law" (art. 17, para. 2). Likewise, the International Convention for the Protection of All Persons from Enforced Disappearance supplements the general guarantee of "fair treatment" with a further sentence, which states, in article 11, paragraph 3: "Any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law." Although some delegations to the negotiations of this convention found this second sentence unnecessary, several others viewed it as important to acknowledge this specific right.[531]

188. The Human Rights Committee in Comment No. 32 also addressed the issue of whether a fair trial could include trial by the use of military courts. It stated at paragraph 22:

> The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military. The Committee notes the existence, in many countries, of military or special courts which try civilians. While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is

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[529] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (see footnote 99 above), art. 2(f).

[530] Statute of the International Tribunal for Rwanda (see footnote 100 above), art. 4(g).

[531] Commission on Human Rights, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), para. 95.

> necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.[532]

189. Like the International Covenant on Civil and Political Rights, virtually all treaties addressing crimes or specific types of human rights violations within a national legal system do not prohibit the use of military courts to try alleged offenders. The one exception is the Inter-American Convention on the Forced Disappearance of Persons, which contains such a prohibition.[533] An explanation for that prohibition may relate to the specific offence of forced disappearance, which the Inter-American Court of Human Rights said in 2009 "can never be considered as a legitimate and acceptable means for compliance with a military mission".[534] The 1992 Declaration on the Protection of All Persons from Enforced Disappearance, which influenced the 1994 Inter-American Convention, provided that alleged offenders "shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts".[535] Even so, such a prohibition was not included in the International Convention for the Protection of All Persons from Enforced Disappearance, nor has it appeared in any other global treaty, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[536] As such, a 2004 report of the International Commission of Jurists found that: "With the exception of the Declaration on the Protection of All Persons from Enforced Disappearance and the Inter-American Convention on Forced Disappearance of Persons, there are no specific norms, of either a treaty-based or declaratory nature, within international human rights law relating to military offences, military jurisdiction or military 'justice'."[537]

190. Further, the report of the International Commission of Jurists — as a part of a survey of national laws worldwide[538] — noted that "[m]ilitary jurisdiction and 'military justice' exist as institutions in many countries. It also remains common practice in many parts of the world for military personnel who have committed human rights violations to be tried in military courts".[539] At the same time, the International Commission of Jurists found "trends" within national legal systems toward either the abolition or at least reform of military courts, such as by strengthening the role of civilian judges in military courts, bringing their procedures into line with the rules of procedure used in ordinary courts, or precluding the use of military courts to try civilians.[540] Along those lines, the United Nations Commission

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[532] Human Rights Committee, General Comment No. 32 (CCPR/C/GC/32), para. 22.

[533] Art. IX. As of September 2015, 15 States are parties to this convention.

[534] *Radilla-Pacheco* v. *Mexico, Case No. 777/01, Judgment of 23 November 2009*, Inter-American Court of Human Rights, Series C, No. 209, para. 227.

[535] Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992, art. 16, para. 2.

[536] Separately, the report of the Independent Expert to update the Set of principles to combat impunity, containing the 2005 Updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), included in principle 29 a restriction on the jurisdiction of military tribunals "solely to specifically military offences committed by military personnel, to the exclusion of human rights violations", but that set of principles was not adopted by the Commission on Human Rights.

[537] International Commission of Jurists, p. 17.

[538] *Ibid.*, pp. 169–378 (surveying the laws of 30 States).

[539] *Ibid.*, p. 158.

[540] *Ibid.*, pp. 158–164. For examples in Latin America of constitutional restrictions on the use of military courts, limiting their jurisdiction solely to offences of a military nature (and excluding international crimes), see the Plurinational State of Bolivia: Nueva Constitución Política del Estado (2009), article 180, paragraph III ("La jurisdicción ordinaria no reconocerá fueros, privilegios ni tribunales de excepción. La jurisdicción militar juzgará los delitos de naturaleza militar regulados por la ley"); Constitución de la República del Ecuador 2008, article 160

on Human Rights in 2006 reviewed and affirmed the draft principles governing the administration of justice through military tribunals ("Decaux principles"),[541] which set forth various means for reforming military courts. Among other things, the Decaux principles provide that "[m]ilitary courts should, in principle, have no jurisdiction to try civilians"[542] and that "[i]n all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes".[543] Similarly, notwithstanding the lack of a prohibition on the use of military courts in the International Convention for the Protection of All Persons from Enforced Disappearance, the Committee on Enforced Disappearances asserted in 2015: "Taking into account the provisions of the Convention and the progressive development of international law in order to assure the consistency in the implementation of international standards, the Committee reaffirms that military jurisdiction ought to be excluded in cases of gross human rights violations, including enforced disappearance".[544]

191. Some national laws that specifically address crimes against humanity preclude the use of military courts for the prosecution of alleged offenders.[545] Concerns regarding the use of military courts tend to focus on the propriety of prosecuting gross human rights violations in such courts (such as for forced disappearances in the International Convention for the Protection of All Persons from Enforced Disappearance),[546] on the rights and protections afforded to persons brought to trial before military courts, on the use of such courts to prosecute persons other than military personnel of the State,[547] or on problems associated with the

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("Los miembros de las Fuerzas Armadas y de la Policía Nacional serán juzgados por los órganos de la Función Judicial; en el caso de delitos cometidos dentro de su misión específica, serán juzgados por salas especializadas en materia militar y policial, pertenecientes a la misma Función Judicial. Las infracciones disciplinarias serán juzgadas por los órganos competentes establecidos en la ley"); Constitución de la República de El Salvador (1983) (as amended), article 216(3) ("Gozan del fuero militar los miembros de la Fuerza Armada en servicio activo por delitos y faltas puramente militares"); Constitución Nacional [Paraguay], 1992, article 174 ("Los tribunales militares solo juzgarán delitos o faltas de carácter militar, calificados como tales por la ley, y cometidos por militares en servicio activo. Sus fallos podrán ser recurridos ante la justicia ordinaria"). See also International Commission of Jurists, pp. 164–168.

[541] Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, to the Commission on Human Rights (E/CN.4/2006/58).

[542] *Ibid.*, principle 5.

[543] *Ibid.*, principle 9.

[544] Report of the Committee on Enforced Disappearances on its eighth session (A/70/56), Annex III, para. 10.

[545] See, for example, Uruguay, Law No. 18.026 of 25 September 2006, article 11 ("Los crímenes y delitos tipificados en la presente ley no podrán considerar como cometidos en el ejercicio de funciones militares, no serán considerados delitos militares y quedará excluida la jurisdicción militar para su juzgamiento").

[546] See, for example, Consideration of reports submitted by States parties under article 19 of the Convention, concluding observations of the Committee against Torture, Colombia (CAT/C/COL/CO/4), para. 16 ("The State party should put an immediate stop to these crimes and comply fully with its obligation to ensure that gross human rights violations are investigated impartially under the ordinary court system, and that the perpetrators are punished. The gravity and nature of the crimes clearly show that they fall outside military jurisdiction"); and Amnesty International, p. 218 (calling for the use of military courts only to try military personnel for breaches of military discipline, not for any crime under international law, including war crimes and crimes against humanity).

[547] See, for example, Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding observations of the Human Rights Committee, Chile

military justice system of particular States. At the same time, such reforms normally leave in place the ability of military personnel to be prosecuted before military courts for "military crimes", especially when committed in time of armed conflict.

192. While such developments at the national and international levels remain ongoing, they may suggest an emerging view that the guarantee of a "fair trial" means that a military court, tribunal, or commission should not be used to try persons alleged to have committed crimes against humanity, unless the alleged offender is a member of the military forces and the offence was committed in connection with an armed conflict.

C. Full protection of human rights

193. In addition to according to an alleged offender fair treatment in the course of any proceedings or measures taken against him or her, and in particular according to him or her a fair trial, an alleged offender is also entitled to the broader protections that always exist with respect to his or her human rights. Such rights are set forth in the wide range of provisions contained in global human rights treaties, such as the International Covenant on Civil and Political Rights and in the various regional human rights treaties,[548] and are addressed as well in other instruments.[549]

194. Given the possibility that an alleged offender may be taken into custody and may be interrogated, particular mention is merited as to the obligations of States under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. That Convention, among other things, provides that "[e]ach State party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction" (art. 2, para. 1). The Convention further provides that "[e]ach State party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture ... when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" (art. 16, para. 1).

195. No doubt for this reason, treaties addressing crimes have often included in the "fair treatment" provision some additional reference to "full protection of his or her rights",[550] "enjoyment of all the rights and guarantees provided by the law of the State in the territory of which he is present",[551] "enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that

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(CCPR/C/79/Add.104), para. 9 (recommending that Chilean law "be amended so as to restrict the jurisdiction of the military courts to trial only of military personnel charged with offences of an exclusively military nature"); *Durand and Ugarte* v. *Peru, Judgment of 16 August 2000*, Inter-American Court of Human Rights, Series C, No. 68, para. 117; *Mapiripán Massacre* v. *Colombia, Judgment of 15 September 2005*, Inter-American Court of Human Rights, Series C, No. 122, para. 202; and Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Report of the Working Group on Arbitrary Detention, Addendum–Mission to Equatorial Guinea (A/HRC/7/4/Add.3), para. 100(f).

[548] See footnotes 517–518 above, the American Convention on Human Rights: "Pact of San José, Costa Rica" (art. 8) and the African Charter on Human and Peoples' Rights (art. 7).

[549] See, for example, the Universal Declaration of Human Rights, General Assembly resolution 217 A (III) of 10 December 1948; American Declaration of the Rights and Duties of Man (see footnote 514 above); the Cairo Declaration on Human Rights in Islam (see footnote 515 above); and the Charter of the Fundamental Rights of the European Union.

[550] Convention on the Safety of United Nations and Associated Personnel, art. 17.

[551] International Convention against the taking of hostages, art. 8, para. 2.

person is present and applicable provisions of international law, including international law of human rights"[552] or similar formulations.

D. Communication with the State of nationality or other relevant State

196. If a State takes into custody an alleged offender who is not of that State's nationality, the alleged offender may wish to contact a representative of his or her State, in particular consular officials who may assist on various issues, including retention of counsel and translation. The 1963 Vienna Convention on Consular Relations provides in article 36, paragraph 1(*b*), that:

> if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.

197. Further, article 36, paragraph 1(*c*), provides in part that "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation".[553]

198. When the Commission developed the draft article that ultimately contained these provisions, it did so based on existing consular practice operating under bilateral agreements and under customary international law. As of 2015, 177 States are party to the Vienna Convention on Consular Relations. Further, many States incorporate comparable provisions in their bilateral agreements.[554] Even in the absence of a treaty, "[t]he practice of states shows that the right of a diplomatic agent or a consular officer to interview an imprisoned national is usually conceded".[555] This is the case because "it is abundantly clear" that any denial of this consultative right "would be in violation of the principles of international law and as such wrongful".[556]

199. Notwithstanding the widespread adherence to the Vienna Convention on Consular Relations and the existence of comparable provisions in other treaties and in customary international law, treaties addressing crimes typically reiterate that the alleged offender is entitled to communicate with, and be visited by, his or her State of nationality (or, if a stateless person, with the State where he or she usually resides or that is otherwise willing to protect that person's rights). While the Convention on the

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[552] International Convention for the Suppression of Terrorist Bombings, art. 14.

[553] See also Lambert, pp. 180–181.

[554] See, for example, Consular Convention between the Socialist Republic of Vietnam and the People's Republic of China, signed at Beijing on 19 October 1998, S.S. No. 5 TO Gazette No. 37/2001, art. 39, available from www.doj.gov.hk/lawdoc/bilateral/cavietnam_e.pdf. For 39 bilateral agreements between the United Kingdom and other States, see Police and Criminal Evidence Act 1984, Code C: Code of Practice for the detention, treatment and questioning of persons by police officers, Annex F—Countries with which bilateral consular conventions or agreements requiring notification of the arrest and detention of their nationals are in force as at 1 April 2003, available from www.gov.uk/government/uploads/system/uploads/attachment_data/file/117588/pace-code-c.pdf. For 59 bilateral agreements between the United States and other States, see Department of Homeland Security, Bureau of Immigration and Customs Enforcement, 8 CFR Part 236.1(e), *Federal Register*, vol. 72, No. 10 (17 January 2007).

[555] Sen, p. 372.

[556] *Ibid.*; see also Schwarzenberger, p. 194.

Prevention and Punishment of the Crime of Genocide and the Geneva Conventions for the protection of war victims did not contain a provision of this type, many contemporary treaties do, such as the Convention on the suppression of unlawful seizure of aircraft (art. 6); the Convention for the suppression of unlawful acts against the safety of civil aviation (art. 6, para. 3); the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (art. 6, para. 2); the International Convention against the taking of hostages (art. 6, para. 3); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 6, para. 3); the Convention on the Safety of United Nations and Associated Personnel (art. 17, para. 2); the International Convention for the Suppression of Terrorist Bombings (art. 7, para. 3); the International Convention for the Suppression of the Financing of Terrorism (art. 9, para. 3); the OAU Convention on the Prevention and Combating of Terrorism, 1999 (art. 7, para. 3); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 10, para. 3); and the ASEAN Convention on Counter Terrorism (art. VIII, para. 4).

200. The Commission has noted that the obligation to permit a person in custody to communicate with his or her State is "designed to safeguard the rights of the alleged offender".[557] Furthermore, writers have explained that the right to communicate with a consular representative serves as protection against the potential for State abuse, allowing for a determination "of whether a prisoner is receiving humane treatment and enjoying other procedural rights guaranteed by international law".[558]

E. Draft article 10. Fair treatment of the alleged offender

201. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

Draft article 10. Fair treatment of the alleged offender

1. Any person against whom legal measures are being taken in connection with an offence referred to in draft article 5, paragraphs 1 and 2, shall be provided at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law.

2. Any such person taken into custody by a State that is not of his or her nationality shall be:

(*a*) permitted to communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights;

(*b*) permitted to be visited by a representative of that State or those States; and

(*c*) informed without delay of his or her rights under this subparagraph.

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[557] See Lambert, p. 177 (citing *Yearbook ... 1972*, vol. II, p. 318).

[558] *Ibid.*

CHAPTER VII

Future programme of work

202. The subsequent programme of work on the topic will be for the members of the Commission elected for the quinquennium 2017-2021. A possible timetable would be for a third report to be submitted in 2017, which could address issues such as rights and obligations applicable to the extradition of the alleged offender; rights and obligations applicable to mutual legal assistance in connection with criminal proceedings; the obligation of *non-refoulement* in certain circumstances; dispute settlement and monitoring mechanisms; and conflict avoidance with treaties such as the Rome Statute of the International Criminal Court.

203. A fourth report, to be submitted in 2018, could address all further matters, as well as a draft preamble and draft concluding articles to a convention.

204. If such a timetable is maintained, it is anticipated that a first reading of the entire set of draft articles could be completed by 2018 and a second reading could be completed by 2020.

Annex I

Draft articles provisionally adopted by the Commission at its sixty-seventh session[1]

Article 1. *Scope*

The present draft articles apply to the prevention and punishment of crimes against humanity.

Article 2. *General obligation*

Crimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish.

Article 3. *Definition of crimes against humanity*

1. For the purpose of the present draft articles, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(*a*) murder;

(*b*) extermination;

(*c*) enslavement;

(*d*) deportation or forcible transfer of population;

(*e*) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(*f*) torture;

(*g*) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity;

(*h*) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes;

(*i*) enforced disappearance of persons;

(*j*) the crime of apartheid;

(*k*) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(*a*) "attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

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[1] See *Yearbook ... 2015*, vol. II (Part Two), para. 116.

(*b*) "extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(*c*) "enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(*d*) "deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(*e*) "torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused, except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(*f*) "forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(*g*) "persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(*h*) "the crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(*i*) "enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of the present draft articles, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

4. This draft article is without prejudice to any broader definition provided for in any international instrument or national law.

Article 4. *Obligation of prevention*

1. Each State undertakes to prevent crimes against humanity, in conformity with international law, including through:

(*a*) effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction or control; and

(*b*) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

2. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.[2]

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[2] The placement of this paragraph will be addressed at a further stage.

Annex II

Draft articles proposed in the second report

Draft article 5. *Criminalization under national law*

1. Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law: committing a crime against humanity; attempting to commit such a crime; and ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

2. Each State also shall take the necessary measures to ensure that the following are offences under its criminal law:

(*a*) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes against humanity committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(*b*) With respect to superior and subordinate relationships not described in paragraph (*a*), a superior shall be criminally responsible for crimes against humanity committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) the crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

3. Each State also shall take the necessary measures to ensure that:

(*a*) the fact that an offence referred to in this draft article was committed pursuant to an order of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate;

(*b*) an offence referred to in this draft article shall not be subject to any statute of limitations; and (*c*) an offence referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.

Draft article 6. *Establishment of national jurisdiction*

1. Each State shall take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5, paragraphs 1 and 2, when:

(*a*) the offence is committed in any territory under its jurisdiction or control or on board a ship or aircraft registered in that State;

(*b*) the alleged offender is one of its nationals; and

(*c*) the victim is one of its nationals and the State considers it appropriate.

2. Each State shall also take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5, paragraphs 1 and 2, when the alleged offender is present in any territory under its jurisdiction or control, unless it extradites or surrenders the person in accordance with draft article 9, paragraph 1.

3. Without prejudice to applicable rules of international law, this draft article does not exclude the establishment of other criminal jurisdiction by a State in accordance with its national law.

Draft article 7. *General investigation and cooperation for identifying alleged offenders*

1. Each State shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reason to believe that a crime against humanity has been or is being committed in any territory under its jurisdiction or control.

2. If the State determines that a crime against humanity is or has been committed, the State shall communicate, as appropriate, the general findings of that investigation to any other State whenever there is reason to believe that nationals of the other State have been or are involved in the crime. Thereafter, that other State shall promptly and impartially investigate the matter.

3. All States shall cooperate, as appropriate, to establish the identity and location of persons who may have committed an offence referred to in draft article 5, paragraphs 1 or 2.

Draft article 8. *Exercise of national jurisdiction when an alleged offender is present*

1. If a State obtains or receives information indicating that a person present in territory under its jurisdiction or control may have committed an offence referred to in draft article 5, paragraphs 1 or 2, the State shall immediately carry out a preliminary investigation to establish the relevant facts with respect to that person.

2. If the circumstances so warrant, the State shall take the person into custody or take such other legal measures as are necessary to ensure his or her presence during the investigation and at criminal, extradition or surrender proceedings. The custody and other legal measures shall be as provided for in the

law of that State, but shall be in conformity with international law and maintained only for such time as is reasonable.

3. The State shall notify the States referred to in draft article 6, paragraph 1, of the general findings of its preliminary investigation, of the circumstances warranting any detention, and whether it intends to submit the matter to its competent authorities for the purpose of prosecution.

Draft article 9. Aut dedere aut judicare

1. If a person alleged to have committed an offence referred to in draft article 5, paragraphs 1 and 2, is found in any territory under the jurisdiction or control of a State, that State shall submit the matter to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal.

2. If the State submits the matter to its competent authorities for the purpose of prosecution, those authorities shall decide whether and how to prosecute in the same manner as they would for any ordinary offence of a serious nature under the law of that State.

Draft article 10. *Fair treatment of the alleged offender*

1. Any person against whom legal measures are being taken in connection with an offence referred to in draft article 5, paragraphs 1 and 2, shall be provided at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law.

2. Any such person taken into custody by a State that is not of his or her nationality shall be:

(*a*) permitted to communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights;

(*b*) permitted to be visited by a representative of that State or those States; and

(*c*) informed without delay of his or her rights under this subparagraph.